Jany 21 argued
Feb 10 Postponed.
Feb 16. Rec'd Return

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 123.

THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM PACKET COMPANY, PLAINTIFF IN ERROR,

vs.

FREDERICK E. SICKLES AND TRUEMAN COOK.

CERTIORARI AND RETURN.

FILED JANUARY 22, 1867.

SUPREME COURT OF THE UNITED STATES.

No. 123.

THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM PACKET COMPANY, PLAINTIFF IN ERROR,

vs.

FREDERICK E. SICKLES AND TRUEMAN COOK.

1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the District of Columbia, greeting:

Whereas in a certain suit in said supreme court between Frederick E. Sickels and Trueman Cook, plaintiffs, and the Washington, Alexandria, and Georgetown Steam Packet Company, defendants, which suit was removed to the Supreme Court of the United States by virtue of writ of error, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

1. Writ, (original.)
2. Declaration.
3. Plea.
4. Certificate and notice and papers belonging to deposition of Job Carson, 11th exception.
5. Assignment A, referred to in 3d exception.

You, therefore, are hereby commanded that searching the records and proceedings in said cause, you certify what omissions and errors you shall find to the said Supreme Court of the United States, so that you shall have the same, together with this writ,

2 before the said Supreme Court forthwith.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this 21st day of January, A. D. 1867.

D. W. MIDDLETON,
Clerk Sup. Court U. States.

3 In the supreme court of the District of Columbia. Trials Jan., 1858.

FREDERICK E. SICKLES and TRUEMAN COOK *vs.* THE WASH'N ALEX. & GEORGETOWN STEAM Packet Company. } No. 10.

Be it remembered, that heretofore, to wit, on the 16th day of

October, 1846, the said plaintiffs, by Joseph H. Bradley, esq., their attorney, prosecuted and sued forth out of the circuit court here the United States writ of subpœna to the marshal of the District of Columbia directed in the words and of the tenor following, to wit:

Subpœna.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to the marshal of the District of Columbia, greeting:

1. We command you that you summon the Washington, Alexandria & Georgetown Steam Packet Company, late of Washington county, if it shall be found within the county of Washington, in your said district, and it safely keep, so that you have its body before the circuit court of the District of Columbia, to be held for the county aforesaid, at the city of Washington, on the third Monday of October, instant, to answer unto Frederick E. Sickles and Trueman
4 Cook in a plea of trespass on the case, and so forth. Hereof fail not at your peril, and have you then and there this writ.

Witness W. Cranch, esq., chief judge of our said court, at the city of Washington, the 5th day of June, anno Domini one thousand eight hundred and forty-six.

Issued this 16th day of October, 1846.

W. BRENT, *Clerk.*

Bradley.

Oct. term, 1846.

At which said third Monday of October, 1846, and the day of the return of the aforegoing writ, come again into the circuit court here, the said plaintiffs by their attorney aforesaid, and the marshal of the District aforesaid, to whom the said aforegoing writ was in form aforesaid directed, makes return thereof to the court here, certifying that he had served the same on James Adams, esquire, the president of said company, and summoned him to appear to said suit, and the said company, being called, appears in court here by James M. Carlisle, esq., its attorney.

The said cause was regularly continued until the third Monday of October, 1857, when the said plaintiffs, by their attorney aforesaid, declared against the said defendant in form following, to wit:

5 *Amended nar.*

FREDERICK E. SICKLES AND TRUMAN COOK
vs.
THE WASHINGTON, ALEXANDRIA AND GEORGETOWN STEAM PACKET COMPANY.

The Washington, Alexandria, and Georgetown Steam Packet Company was summoned to answer Frederick E. Sickles and Truman Cook of a plea of trespass on the case upon promises, and thereupon

said plaintiffs, by Joseph H. Bradley, their attorney, complain: For that whereas, heretofore, to wit, on the 18th day of June, in the year eighteen hundred and forty-four, at the county aforesaid, the said plaintiffs being the owners of the patent right for a certain machine called "Sickles' cut-off," designed to effect a saving in the consumption of fuel by steam engines, and the said defendants being the owners of a certain steamboat called the Columbia, running on the Potomac river and Chesapeake bay, it was mutually agreed by and between said plaintiffs and said defendants that said plaintiffs would cause one of the machines to be constructed and at-
6 tached to the engine of said steamboat of defendants so soon as the same could conveniently be done, at a cost not to exceed two hundred and fifty dollars, the cost and expense of attaching the same to be paid for out of the first saving of fuel effected by its use, and that said cut-off should be constructed and applied to said engine by the firm of T.W.& B.C.Smith, of Alexandria, and if said cut-off when applied to said engine should fail to effect a saving of fuel, that it should be removed therefrom at the expense of said plaintiffs; and it was also agreed in consideration thereof, that if said cut-off when constructed and applied to said engine should effect a saving in the consumption of fuel thereby, that said defendants would use the said cut-off on their said engine on said steamboat Columbia during the continuance of the patent rights of said plaintiff, if said boat should last so long, and would apply the value of all the first savings of fuel on board said boat, effected by the use of said cut-off, in the first place to the payments of the cost and expense of constructing and attaching said cut-off to the engines of said boat, not exceeding two hundred and fifty dollars, until the same was fully paid and satisfied;
7 and thereafter and after having paid said cost and expense, that said defendants would, during the continuance of said patent right, if said steamboat should last so long, pay to said plaintiffs three-fourths of the value of the fuel saved by the use of said cut-off. And it was also agreed, then and there, by and between said plaintiff and said defendants, that the saving of fuel caused by the use of said machine, called "Sickles' cut-off," on said steamboat should be ascertained at such time as said plain shall desire it, in the following manner, to wit, by taking two piles of wood, each of equal quantity, and using the same—first one pile without, and then the other with the use of said cut-off, and thus to show whether the said boat would run the longest, under the same circumstances, with or without the use of said cut-off, and that the said proportion of savings, so as aforesaid ascertained, should be paid by said defendants to said plaintiffs weekly, or monthly, or whensoever said defendants should be requested to pay the same. And thereupon the said plaintiffs, relying on said promises and undertaking of said defendants, and at their request, at great cost, to wit, at the cost of two hundred and twenty-five dollars, did cause and procure the firm of T. W. & B. C.
8 Smith, of Alexandria, to construct and apply to said engine, of said steamer Columbia, said machine called "Sickles' cut-off," which said machine ever since, to wit, from the 9th day of No-

vember, in the year eighteen hundred and forty-four, continually to the bringing of this action, hath been used by said defendants in and upon said boat, attached to the engine thereof, and said plaintiffs aver and say that heretofore, to wit, on the nineteenth day of August, in the year eighteen hundred and forty-five, at the county aforesaid, they gave notice to said defendants that on the next day, that is to say, on the twentieth day of August, in the same year, they desired to make the experiment in said agreement mentioned, to ascertain the amount of fuel saved by the use of said "Sickles' cut-off," and for that purpose that one of said plaintiffs would go from the city of Washington, in the District of Columbia, to the city of Baltimore, in the State of Maryland, in the said steamboat on the said day, to wit, the twentieth day of August before mentioned, for the purpose of making said experiment, and the said defendants then and there, by their president,
9 did assent thereto, and did direct the officers of said boat, or some of them, to aid in conducting said experiment; and said plaintiffs further say that one of said plaintiffs, to wit, the said Truman Cook, did, on said twentieth day of August, A. D. 1845, proceed in said boat from said city of Washington to said city of Baltimore, and did on the said voyage, with the assistance of the officers of said boat, make the said experiment, by taking two piles of wood of equal dimensions and under like circumstances, using one pile of wood without, and the other pile of wood, the said cut-off being in operation, was burned in two hours and seven minutes, the engine making twenty-one revolutions per minute, and the pile used, while the "Sickles' cut-off" was in operation, lasted three hours and fifteen minutes, the engine making the same number of revolutions, to wit, twenty-one per minute, showing a saving in favor of said cut-off of thirty-four and one hundred and seventy-five one hundred and nineteenth per cent., of all of which the said defendants afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice; and said plaintiffs aver that a great quantity of fuel has been saved to said defendants by the use of said "Sickles' cut-off" on the engine of said steamboat Columbia
10 from said ninth day of November, in the year eighteen hundred and forty-four, to said nineteenth day of March, in the year eighteen hundred and forty-six, to wit, the amount of one thousand cords of wood of great value, to wit, of the value of twenty-five hundred dollars; and said plaintiffs say that they are entitled to have and recover of said defendants, as a part of said savings, as well the said sum of two hundred and twenty-five dollars for the cost of constructing and applying said cut-off to the engine on said steamboat, as also the further sum, to wit, the sum of nineteen hundred and seventy-five dollars, the value of three-fourths of the fuel saved to said defendant (after deducting the cost of making and applying said cut-off as aforesaid) by the use of said cut-off on the engine of said steamboat of defendants during the period of time aforesaid, to wit, from said 9th day of November, A. D. 1844, to said 19th day of March, A. D. 1846.

Yet the said defendant the said several sums of money before mentioned, or any part thereof, altho' often requested so to do, to wit, on the day and year last aforesaid, at the county aforesaid, and often afterwards; but the same to pay, or any part thereof, have hitherto wholly refused, to the damage of said plaintiff in the
11 sum of five thousand dollars; and therefore they sue, &c.

JOS. H. BRADLEY,
Pl'ffs' Att'y.

Whereupon the said defendants, by their attorney aforesaid, defend the force and injury, when, and so forth, and say that they did not assume upon themselves, in maaner and form as the aforesaid plaintiffs have above against them declared, and of this they put themselves upon the country; and said plaintiffs in like manner, and so forth.

A.

12 Supreme Court of the United States.

The United States Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office.

In testimony whereof I, D. P. Holloway, Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this fourteenth day of November, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-eighth.

[SEAL.] D. P. HOLLOWAY.

Whereas, on the twentieth day of May, one thousand eight hundred and forty-two, letters patent was granted by the government of the United States of America to Frederick E. Sickles, of the city, county, and State of New York, for a steam cut-off; and whereas on the nineteenth day of September, one thousand eight hundred and forty-five, the said government granted to the said Sickles a patent for an improvement on the said former invention; and whereas the said Sickles and Truman Cook, of the city, county, and State of New York, are now equal and joint owners of the said patents:

Now, therefore, this agreement witnesseth: That the said Sickles and Cook, for and in consideration of the sum of one dollar, to each paid by William B. Sickles, of the said city, county, and State of New York, the receipt whereof is hereby acknowledged by the said Sickles and Cook, and for and in consideration of the services heretofore rendered by the said William B. Sickles to the said Sickles and Cook, the said Frederick E. Sickles and the said Truman Cook hereby sell, assign, transfer, and set over unto the said William B. Sickles, his heirs and assigns, the said mentioned patents, and all

and every emolument and profit that can or may be derived by virtue thereof, whether for past infringements or other interests that may accrue therefrom.

In witness whereof we have hereunto affixed our seals and signed our names this fifth day of August, one thousand eight hundred and forty-eight.

[SEAL.] FREDERICK E. SICKLES.
[SEAL.] TRUMAN COOK.

Signed, sealed, and delivered in the presence of witnesses—
D. M. HUDSON.
WILLIAM J. KING.

13 UNITED STATES OF AMERICA, *State of Maryland, to wit:*

I, David W. Hudson, notary public by letters patent under the great seal of the State of Maryland, commissioned and duly qualified, residing in the city of Baltimore, in the State aforesaid, do hereby certify, attest, and make known, that on the day of the date hereof, before me, personally appeared Frederick E. Sickles and Truman Cook—they having been proven by oral testimony under oath, before me, to be the persons named and described as, and professing to be, the parties to the foregoing instrument, transfer, or bill of sale, and each for himself, acknowledged the same to be his act and deed, according to the true intent and meaning thereof, of which an act having been of me requested, I have granted these presents, to serve and avail as need or occasion may require.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this fifth day of August, in the year of our Lord eighteen hundred and forty-eight.

[SEAL.] D. W. HUDSON,
Notary Public.

Received and recorded August 8, 1848.

B.

NEW YORK CITY AND COUNTY, *March 2d*, 1855.

For value received, I, as assignee of Frederick E. Sickles and Truman Cook, assign, transfer, and set over all the right, title, claim, and interest in and to the certain suits now pending in the district court of Washington county, in the District of Columbia, in which F. E. Sickles and Truman Cook are plaintiffs, and the Washington, Georgetown, and Alexandria Steam Packet Company, defendants, to George Mattingly; and I do hereby warrant and defend the said Mattingly in the possession of said suits against the above-named F. E. Sickles and Truman Cook, and against all others claiming under, by, or through me or either of them. As witness my hand and seal this day and year first hereinbefore written.

[SEAL] W. B. SICKLES.

Signed, sealed, and delivered in presence of—
FRED'K E. WESTBROOK.

CITY AND COUNTY OF NEW YORK.

On the 2d day of March, A. D. 1855, before me, came William B. Sickles, known to me to be the individual described in, and who executed the within instrument, and who acknowledged that he executed the same.

FREDERICK E. WESTBROOK,
Commissioner of Deeds.

14 C.

Circuit court of the District of Columbia for the county of Washington.—March term, 1855.

FREDERICK E. SICKLES and TRUMAN COOK
vs.
THE WASHINGTON, GEORGETOWN, and Alexandria Steam Packet Company. } Trials and imparlances.

Mr. Smith, clerk of said court:

Will please enter these cases, and all cases with this titling now pending in said court, to the use of George Mattingly—he to pay all fees and costs.

F. E. SICKLES.

12th March, 1855.

Mr. SMITH: Please to make the entries as above.

JOS. H. BRADLEY,
Plaintiffs' Attorney.

12th March, 1855.

15 In the supreme court of the District of Columbia, Jan'y 22, 1867.

I, Return J. Meigs, clerk of the supreme court of the District of Columbia, hereby certify that the foregoing writings annexed to the writ of certiorari aforesaid, are truly copied from originals on file and of record in this office, the said writings being numbered in accordance with the numbers set forth in said writ. And I certify that there is no original on file in this office, or of record in it, corresponding with the document numbered 4 in said writ.

Given under my hand and the seal of the said court.

R. J. MEIGS, *Clerk.*

16 *Plff's 1st excpts.*

SICKLES & COOK
v.
STEAMBOAT COMPANY.

And the plaintiffs, before and at the time the testimony of said Isherwood was offered and given, by their counsel, objected to the admissibility of said evidence, as not tending to show what was in issue on

the former trial as set out in the first count in their declaration, and the court overrules the said objection, and thereupon the said witness was examined on the part of the defendants, and testified as follows, (here insert examination of Isherwood,) and the plaintiffs object to the whole of said testimony of said Isherwood as inadmissible in this cause, and the court overrules the said objection, and thereupon the plaintiffs, by their counsel, except to the said rulings of the court, and prays the court to sign and seal this their first bill of exceptions, which is done accordingly, this 19th day of November, 1863.

[SEAL.] D. K. CARTTER, *Chief Justice.*

17 *Plff's 2d except'n.—Second exceptions for plaintiff.*

On the further trial of this cause, and after the evidence set out and contained in the plaintiffs' 1st bill of exception, made part hereof, the defendants (the plaintiffs objecting thereto) further examined the said B. F. Isherwood, who testified as follows, (here insert Mr. Clephane's notes of his evidence as set out in defendant's 9 bill of exceptions;) and the plaintiffs, by their counsel, except to the admissibility of the said testimony and to every part thereof, and pray the court to sign and seal this his second bill of exceptions, which is done accordingly, this 19th day of November, 1863.

[SEAL.] D. K. CARTTER, *Chief Justice.*

18 Sup. C't U. S., No. 123.—Dec. T., 1866.

It is stipulated that the following copies of exceptions by def't in error are parts of the record, to be considered supplied on certiorari.

CARLISLE, *For P. E.*
JOS. H. BRADLEY, *For Def't in Error.*

Filed 22 January, 1867.

O

19 Circuit court of the District of Columbia, Washington county.

SICKLES & COOK, use of GEORGE MATTINGLY,
vs.
THE GEORGETOWN, WASHINGTON, AND ALEXANDRIA Steam Packet Company.

Before me, Lewis McKenzie, mayor of the city of Alexandria, in the State of Virginia, this twenty-third day of November, in the year eighteen hundred and sixty-one, personally appeared George Mattingly, the plaintiff in interest in the above-entitled cause, who, being first duly sworn by me, says that he is advised by counsel and verily believes that the testimony of Job Corson, of the said city of Alexandria, is material and necessary for this deponent in the prosecution of the said cause; that the said Job Corson is now languishing on a bed of sickness, and there is good reason to apprehend and fear that he will not live, by reason of the said sickness, and the fact that he is now exceedingly infirm and unable to leave his bed until the next January term of the said court; and certainly he is so infirm as to render it probable that he will not be able to attend as a
20 witness at the trial of the said cause; and therefore the said George Mattingly desires that the testimony of said witness may be taken de bene esse. And he further says that both the defendants and their attorneys, Messrs. John Marbury and James M. Carlisle, esq., reside in the said county of Washington.

Sworn to before me.

LEWIS McKENZIE,
Mayor, &c.

Let the witness, Job Carson, named in the above affidavit, be examined de bene esse before me accordingly at 11 o'clock a. m., on the twenty-sixth day of November instant, at the residence of the said Job Corson, in Water street, in this city of Alexandria, and let notice be given of the said examination to William Gunton, esq., president of the defendant's company, and the attorneys named in said affidavit, or to one of them, on or before the 26th day of November instant, of such examination.

LEWIS McKENZIE,
Mayor, &c.

In the circuit court of the District of Columbia for the county of Washington.

STATE OF VIRGINIA, *City of Alexandria:*

SICKLES & COOK, use of GEORGE MATTINGLY,
vs.
THE WASHINGTON, GEORGETOWN, AND ALEXANDRIA Steam Packet Company.

21 SIR: You are hereby notified that Job Carson will be examined before me, de bene esse, at his residence on Water street in the city of Alexandria aforesaid, at eleven o'clock forenoon,

on the twenty-sixth day of November instant, and also that John J. Wheat, and Benoni Wheat will be examined by me, de bene esse, at the mayor's office in said city, at one o'clock p. m. of the same day, as witnesses in such case made and provided, at which time and place you are entitled by law to be present, and to put interrogatories to the said witness.

Witness my hand, at Alexandria, this twenty-third day of November, 1861.

LEWIS McKENZIE, *Mayor, &c.*

To Wm. Gunton, esq., president of the Washington, Georgetown, and Alexandria Steam Packet Company, and to John Marbury, esq., and James M. Carlisle, esq., attorneys for said defendants.

Be it remembered, that on the twenty-third day of November, 1861, at the city of Alexandria, and State of Virginia, George Mattingly personally appeared before me, Lewis McKenzie, mayor of said city, and made the oath hereto annexed, and that he is the plaintiff to whose use a suit now pending in the circuit court of the District of Columbia for the county of Washington is entered, in which suit Sickles and Cook are plaintiffs, and the Washington and
22 Georgetown and Alexandria Steam Packet Company are defendants, and requested me that the said Job Carson, in said affidavit named, should be examined according to the directions of the act of Congress in such case made and provided, whereupon I ordered that said Job Carson should be examined before me at his residence on Water street, in the said city of Alexandria, at 11 o'clock forenoon, on the *the* twenty-sixth day of November instant, and that notice thereof should be given to the said defendants and their attorneys, that they might be present, if they should see fit, at the said examination, and put interrogatories to the said witness.

And having satisfactory evidence that such notice had been given, I have therefore proceeded with said examination.

And the said Job Carson being carefully examined and cautioned, and duly sworn to testify the whole truth and nothing but the truth, did depose and say as in paper hereunto annexed marked A.

23 A.

That I was on board of the steamer Columbia to go round to Baltimore. Got on board nearly opposite Aquia Creek, near Thorn's Gut, August, 1845. Met on board Capt. Guythers, the mate, Engineer Rudolph, Patrick Kavanaugh, and Trueman Cook. We measured off two piles of wood; they were as near the same size as we could make them. According to my judgment the piles were the same size. Mr. Cook told them to take their choice of the piles. The throttle burnt first. They had the privilege of taking which pile they chose. The throttle pile burnt 2 hours and 7 minutes. After that was consumed they put on Sickles cut-off, and burnt the other pile—that lasted 3 hours and 15 minutes. The steam was kept as near twenty pounds to the square inch as possible—that is what the gauge indicated

During each experiment the engine making the same turns with both cut-offs. The engine making twenty-one revolutions per minute with each cut-off. We took notes every fifteen minutes. Revolutions counted and notes taken to see that steam was kept the same height. Notes kept by myself. Kavanaugh and Cook all kept minutes, but not always at the same times, but frequently all together. All notes separately at times. We went to office of boat and found all agreed.

I am not in the least interested. I paid particular attention.

24 Was present during the whole trial. Gave 15 minutes to see steam up and revolutions. Engineer paid particular attention to his engine, and kept the steam regular. Mr. Kavanaugh was clerk of the boat at the time, and he made minutes of the matter himself. Did not commence experiments until they got through with all their landings. I was aboard several hours before the experiment began. Saw nothing else done before preparing the piles. They let the steam go down to certain point. I suppose the reason they delayed was to have a straight line. The old throttle was put on. Can't say it was 15 pounds or what, but they both started at the same time and run down to the same, and the time was noted accordingly. I do not know how the experiment could be conducted fairer than it was done. I suppose the cock of the inspection pipe was in the room at the hand of the engineer. If the steam had been tampered with the gauge would tell—if she had not enough steam would run down, if too much, would run up. The memorandum was left that night in the office of the boat. The memorandum on a paper in a book, whether it made part of that book cannot say, but think it was; each of us took

25 notes; I had mine for some time; have not them now; I had a copy for a long time. We took the notes for our own satisfaction. I kept my notes for my own satisfaction. I had no earthly interest in doing it. In a book; cannot say whether part of that book or not. Don't think she stopped at Piney Point. No recollection as to what landing. Think most of it was done in the bay; three-quarters, I think, in the bay. I am not positive whether put on in the river or not. The largest portion of the time was in the bay. Boat leaves Washington at 6 o'clock a. m. I got on about noon. I think it was after dark when experiments commenced. I think the lamps were lit. Rather a pleasant night, a gentle breeze blowing from same quarter all night. I have not seen my notes for some time. I was looking, but could not find them. I am satisfied the timings are right. When the throttle was put on, or what was done, I cannot say. It was working well when I saw it; that is, in the experiment. I did not observe on my way down until timing experiments. I went on boat understanding that the experiment was to be made; but not knowing it would be on that day; probably a week before it happened. It was not understood with Captain Cook that I would go on that day. Captain Guyther invited me to go.

(Signed) JOB CORSON.

26 And I do further certify that the preceding deposition was reduced to writing by me in the presence of said witness, and carefully read over to and signed by the said Job Corson, and that I

am not of counsel for either of the parties to the said suit; nor am I interested in the event thereof; and that I have carefully sealed up the depositions with the oath of said George Mattingly; the order to take the said examination; the copy of the notices served on the said defendants and their attorney, annexed together, in an envelope addressed to the "Circuit court of the District of Columbia for the county of Washington, Washington city," and indorsed across the said envelope,

SICKLES & COOK
vs.
THE STEAM PACKET CO. } Deposition.

and deposited the said package, so sealed up and addressed, in the post office at the city of Alexandria aforesaid.

Given under my hand and the seal of the said city of Alexandria, this 26th day of November, 1861.

[SEAL.] LEWIS McKENZIE, *Mayor.*

In the circuit court of the District of Columbia for the county of Washington.

27 STATE OF VIRGINIA, *City of Alexandria:*

SICKLES and COOK, use of MATTINGLY,
vs.
THE WASHINGTON, GEORGETOWN, AND Alexandria Steam Packet Company.

SIR: You are hereby notified that Job Corson will be examined before me, de bene esse, at his residence on Water street, in the city of Alexandria aforesaid, at eleven o'olock forencon, on the twenty-sixth day of November, instant; and also that John J. Wheat and Benoni Wheat will be examined by me de bene esse at the mayor's office in said city, at one o'clock p. m. of the same day, as witnesses for the plaintiff, according to the act of Congress in such case made and provided, at which time and place you are entitled by law to be present, and to put interrogatories to the said witness.

Witness my hand at Alexandria, this twenty-third day of November, 1861.

LEWIS M. KENZIE, *Mayor.*

To Wm. Gunton, esq., president of the Washington, Georgetown & Alexandria Steam Packet Company, and John Marbury, esq., and James M. Carlisle, esq., attorneys for said defendants.

Service acknowledged 23 Nov., '61, at ½ past 12 p. m.

J. M. CARLISLE.

28 *Marshal's return.*

U. S. MARSHAL'S OFFICE, WASHINGTON, D. C.,
November 23, 1861.

I do hereby certify that I served a copy of the within notice on William Gunton and James M. Carlisle, this 23d of November, 1861.

G. W. PHILLIPS,
U. S. Deputy Marshal for the Dist. of Col'a.

29 Stipulated to be received as if returned on certiorari, it being one of the papers described therein.

J. M. CARLISLE, *for Pl'ff.*
JOS. H. BRADLEY, *for Def't.*

Filed 23 January, 1867.

O

SUPREME COURT OF THE UNITED STATES.

No. 123.

WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM PACKET COMPANY, PLAINTIFF IN ERROR,

vs.

SICKLES & COOK.

1st count.

FREDERICK E. SICKLES and TRUMAN COOK
vs.
THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM PACKET COMPANY.

The Washington, Alexandria, and Georgetown Steam Packet Company was summoned to answer Frederick E. Sickles and Truman Cook on a plea of trespass on the case upon promises; and thereupon said plaintiffs, by Joseph H. Bradley, their attorney, complain: For that whereas, heretofore, to wit, on the eighteenth day of June, in the year eighteen hundred and forty-four, at the county aforesaid, the said plaintiffs being the owners of the patent right for a certain machine called "Sickles cut-off," designed to effect a saving of in the consumption of fuel by steam engines, and the said defendants being the owners of the steamboat called Columbia, running on the
2 Potomac river and Chesapeake bay, it was mutually agreed by and between said plaintiffs and said defendants that said plaintiffs should cause one of said machines to be constructed and attached to the engine of said steamboat of defendants as soon as the same could conveniently be done, at a cost not to exceed two hundred and fifty dollars, the cost and expense of attaching the same to be paid for out of the first savings of fuel effected by its use, and that said cut-off should be constructed and applied to said engine by the firm of T. W. & R. C. Smith, of Alexandria; and if said cut-off when applied to said engine should fail to effect a saving of fuel, that it should be removed therefrom at the expense of said plaintiffs.

And it was also agreed, in consideration thereof, that if said cut-off, when constructed and applied to said engine, should effect the saving in the consumption of fuel thereby, that said defendants would

use the said cut-off on their engine on said steamboat Columbia during the continuance of the patent right of said plaintiffs, if said boat should last so long, and would apply the value of all the first savings of fuel on board said boat effected by the use of said cut-off; in the first place, to the payment of the cost and expense of constructing and attaching said cut-off to the engine of said boat not ex-
3 ceeding two hundred and fifty dollars, until the same was fully paid and satisfied; and thereafter, and after having paid said cost and expense, that said defendants would, during the continuance of said patent right, if said steamboat should last so long, pay to said plaintiffs three-fourths of the value of the fuel saved by the use of said cut-off.

And it was also agreed there and then by and between said plaintiffs and said defendants that the saving of fuel caused by the use of said machine called "Sickles cut-off," on said steamboat, should be ascertained at such time as the said plaintiffs should desire it, in the following manner, to wit, by taking two piles of wood, each of equal quantity, and using the same; first, one pile without and then the other with the use of said cut-off, and thus to show whether the said boat would run the longest under the same circumstances with or without the use of said cut-off; and that the said proportion of savings, so as aforesaid ascertained, should be paid by said defendants to said plaintiffs weekly or monthly, or whensoever said defendants should be requested to pay the same.

And thereupon the said plaintiffs, relying upon said promises and undertakings of said defendants, and at their request, at great cost, to wit, at the cost of two hundred and twenty-five dollars, did
4 cause and procure the firm of T. W. & R. C. Smith, of Alexandria, to construct and apply to said engine of said steamer Columbia, said machine called "Sickles cut off," which said machine, ever since, to wit, from the ninth day of November, A. D. 1854, continually, to the bringing of this action, hath been used by the said defendants in and upon said boat, attached to the engine thereof; and said plaintiffs aver and say, that during said period of time their said patent right continued in full force and virtue in law. And said plaintiffs aver and say, that afterwards, on the 20th day of August, in the year 1845, at the county aforesaid, with the assent of said defendants, they made the experiment provided for in said contract in the manner therein provided, and that said defendants were represented thereat; and that, at and by means of said experiment, so conducted as aforesaid, it was ascertained that the saving effected by the use of Sickles cut-off amounted to 34 175-190 per cent.; and said plaintiffs say that the rate of saving by which their compensation was to be estimated was thereby established between said plaintiffs and defendants. And said plaintiffs say that, afterwards, to wit, on the 19th day of March, 1846, they instituted a suit at law against said defendants in the circuit court of the District of Colum-
5 bia to recover from said defendants said plaintiffs' proportion of the savings which had been effected by the use of said Sickles cut-off, on the said steamer Columbia, up to the time of insti-

tuting said suit, and filed their declaration therein, the first count of which was on said special contract hereinbefore set forth; and afterwards, to wit, on the 22d day of November, A. D. 1855, a jury was duly empannelled and sworn to try the issues of fact duly joined in said cause between said plaintiffs and said defendants; and said plaintiffs say that one of the issues joined in said cause was as to the existence of said contract, as set forth in the first count of said plaintiffs' declaration in said cause, and which said contract is hereinbefore set forth; and that afterwards, to wit, on the 7th day of December, A. D. 1855, the jury rendered a verdict in favor of said plaintiffs on the first count of their said declaration, founded on said contract as aforesaid, and the said circuit court thereupon rendered judgment in favor of said plaintiffs upon the first count of their said declaration. Said plaintiffs aver and say that said verdict of the jury and judgment of the court thereon established the said contract as between said plaintiffs and defendants, and that said defendants are
6 thereby stopped to deny the same. And said plaintiffs aver that a great quantity of fuel has been saved to said defendants by the use of said Sickles cut-off, on the engine of said steamer Columbia, from the 13th day of October, in the year 1846, up to the beginning of this suit, viz, the 26 day of December, 1855, viz, the amount of nine thousand cords of wood of great value, to wit, of the value of fifteen thousand dollars. And said plaintiffs say that they are entitled to have and recover of said defendants, as a part of said savings, a large sum of money, to wit, the sum of fifteen thousand dollars, the value of three-fourths of the fuel saved to said defendants by the use of Sickles cut-off, on the engine of said steamboat Columbia, during the period of time last aforesaid, viz, from the 13th day of October, A. D. 1846, to the 26th day of December, A. D. 1855.

2d count.

For that, whereas, also, heretofore, to wit, on the eighteenth day of June, in the year eighteen hundred and forty-four, at the county aforesaid, the said plaintiffs being the owners of the patent right for a certain machine called "Sickles cut-off," designed to effect a saving in the consumption of fuel by steam engines, and the said
7 defendants being the owners of a steamboat called the Columbia, running on the Potomac river and Chesapeake bay, it was naturally agreed by and between said plaintiffs and said defendants, that said plaintiffs should cause one of said machines to be constructed and attached to the engine of said steamboat of defendants, as soon as the same could conveniently be done, at a cost not to exceed two hundred and fifty dollars, the cost and expense of attaching the same to be paid for out of the first savings of fuel effected by its use, and that said cut-off should be constructed and applied to said engine by the firm of T. W. & R. C. Smith, of Alexandria; and if said cut-off, when applied to said engine, should fail to effect a saving of fuel, that it should be removed therefrom at the expense of

said plaintiffs. And it was also agreed, in consideration thereof, that if said cut-off, when constructed and applied to said engine, should effect a saving in the consumption of fuel thereby, that said defendants would use the said cut-off on their engine on said steamboat Columbia during the continuance of the patent right of said plaintiffs, if said boat should last so long, and would apply the value of all the first savings of fuel on board said boat, effected by the use of
8 said cut-off—in the first place, to the payment of the cost and expense of constructing and attaching said cut-off to the engine of said boat, not exceeding two hundred and fifty dollars, until the same was fully paid and satisfied; and thereafter, and after having paid said cost and expense, that said defendants would, during the continuance of said patent right, if said steamboat should last so long, pay to said plaintiffs three-fourths of the value of the fuel saved by the use of said cut-off. And it was also agreed there and then, by and between said plaintiffs and said defendants, that the saving of fuel caused by the use of said machine called "Sickles cut-off," on said steamboat, should be ascertained at such time as said plaintiffs should desire it, in the following manner, to wit, by taking two piles of wood, each of equal quantity, and using the same, first, one pile without, and then the other with the use of said cut-off, and thus to show whether the said boat would run the longest under the same circumstances with or without the use of said cut-off; and that the said proportion of savings, as aforesaid ascertained, should be paid by said defendants to said plaintiffs weekly or monthly, or whensoever said defendants should be requested to pay the same. And thereupon the said plaintiffs,
9 relying upon said promises and undertakings of said defendants, and at their request, at great cost, to wit, at the cost of two hundred and twenty-five dollars, did cause and procure the firm of T. W. & R. C. Smith, of Alexandria, to construct and apply to said engine of said steamer Columbia said machine, called "Sickles cut-off," which said machine ever since, to wit, from the ninth day of November, in the year eighteen hundred and forty-four, continually to the bringing of this action, hath been used by said defendants in and upon said boat, attached to the engine thereof. And said plaintiffs aver and say that heretofore, to wit, on the nineteenth day of August, in the year eighteen hundred and forty-five, at the county aforesaid, they gave notice to said defendants that on the next day, that is to say, on the twentieth day of August, in the year eighteen hundred and forty-five, they desired to make the experiment in said agreement mentioned, to ascertain the amount of fuel saved by the use of said "Sickles cut off," and for the purpose, that one of said plaintiffs would go from the city of Washington, in the District of Columbia, to the city of Baltimore, in the State of Maryland,
10 in the said steamboat on the said day, to wit, the 20th day of August before mentioned, for the purpose of making said experiment. And the said defendants then and there, by their president, did assent thereto, and did direct the officers of said boat, or some of them, to aid in conducting said experiment. And said plain-

tiffs further say that one of said plaintiffs, to wit, the said Truman Cook, did on the said twentieth of August, A. D. 1845, proceed in said boat from said city of Washington to said city of Baltimore, and did, on the said voyage, with the assistance of the officers of said boat make the said experiment by taking two piles of wood of equal dimensions, and under like circumstances using one pile of wood without and the other pile of wood with the said cut-off in operation. The pile of wood used without the said cut-off being in operation was burned in two hours and seven minutes, the engine making twenty-one revolutions per minute, and the pile of wood used with the "Sickles cut-off" in operation lasted three hours and fifteen minutes, the engine making the same number of revolutions, to wit, twenty-one per minute, showing a saving in favor of said cut-off of thirty-four and one hundred and seventy-five one hundred
11 and ninetieth per cent.; of all of which the said defendants afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice.

And said plaintiffs aver that a great quantity of fuel has been saved to said defendants by the use of Sickles cut-off on the engine of said steamboat Columbia, from the 19th day of October, A. D. 1846, up to the time of bringing this action, viz: the 26th day of December, A. D. 1855, viz: the amount of six thousand cords of wood, of great value, to wit, of the value of fifteen thousand dollars. And said plaintiffs say that they are entitled to have and recover of said defendants, as a part of said savings, a large sum of money, to wit, the sum of ten thousand dollars, the value of three-fourths of the fuel saved to said defendants by the use of said cut-off on the engine of said steamboat of defendants during the period of time last aforesaid.

Yet the said defendants have not paid the several sums of money before mentioned, or any part thereof, although often requested to do so, to wit, on the day and year last aforesaid, at the county aforesaid, and often afterwards; but the same to pay, or any part
12 thereof, have hitherto wholly refused, to the damage of said plaintiffs in the sum of twenty thousand dollars.

And therefore they sue, &c.

JOS. H. BRADLEY, *Pl'ffs' Att'y.*

13 WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM PACKET COMPANY
vs.
SICKLES & COOK.

It is hereby stipulated and agreed that the copy of the declaration in this cause hereto annexed is the one which should have been returned to the certiorari; and is a copy of the declaration on which the jury was sworn and the said cause tried.

JOS. H. BRADLEY, *for Def't in Error.*
J. M. CARLISLE, *for Pl'ff in Error.*

O

SUPREME COURT OF THE UNITED STATES.

No. ~~209.~~ 123.

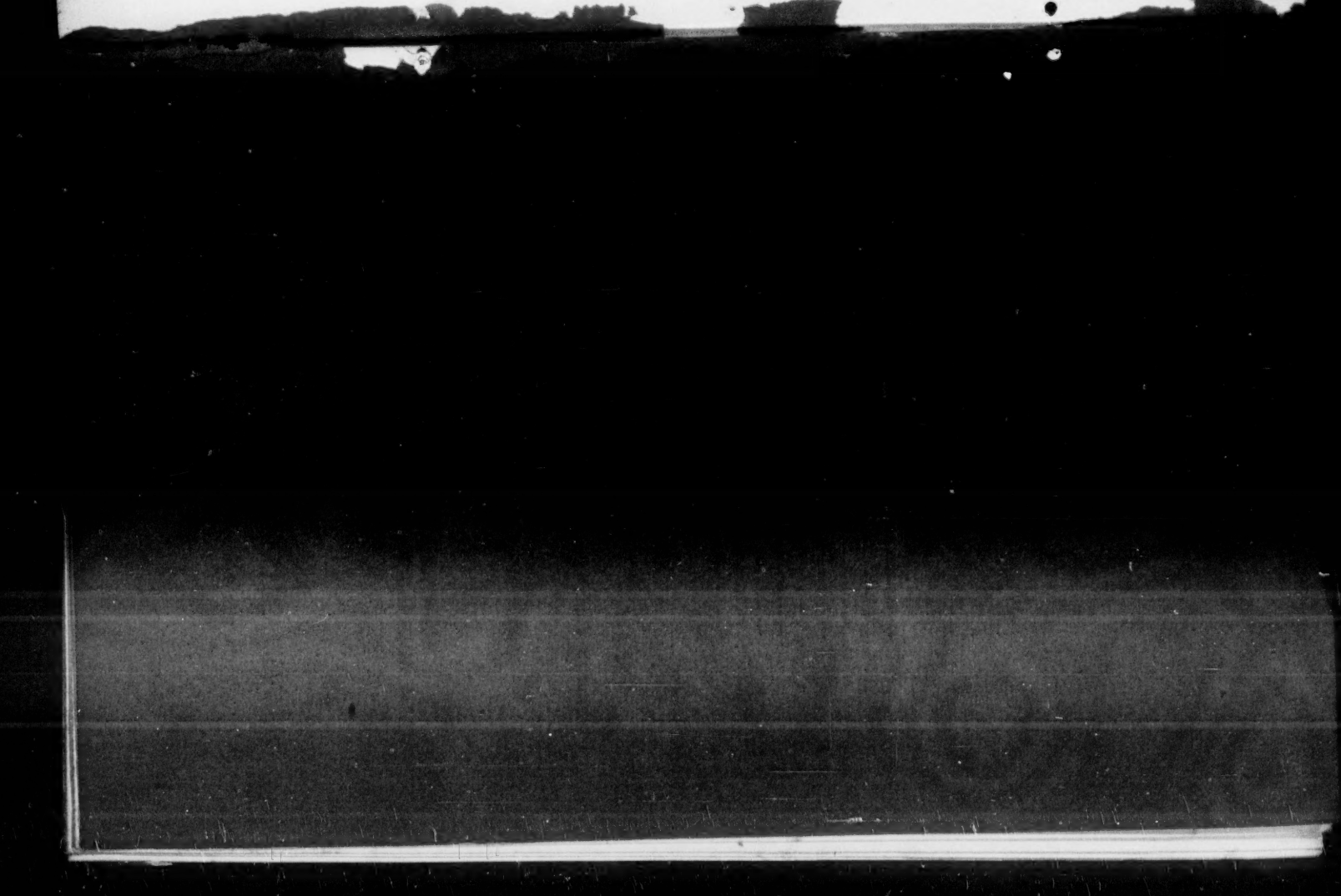
THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM PACKET COMPANY, PLAINTIFF IN ERROR,

vs.

FREDERICK E. SICKLES AND TRUEMAN COOK.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

GOVERNMENT PRINTING OFFICE.



SUPREME COURT OF THE UNITED STATES.

No. 209.

THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM PACKET COMPANY, PLAINTIFF IN ERROR,

vs.

FREDERICK E. SICKLES AND TRUEMAN COOK.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 *Writ of error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the justices of the supreme court of the District of Columbia:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said court before you, or some of you, wherein Frederick E. Sickles and Trueman Cook are plaintiffs and the Washington, Alexandria, and Georgetown Steam Packet Company is defendant, a manifest error hath happened, to the great damage of the said company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Wash-
2 ington on the first Monday of December next, in said Supreme Court, to be then and there held, and that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, which of right and according to the laws and custom of the United States should be done.

Witness the Hon. Roger B. Taney, chief justice of said Supreme Court.

R. J. MEIGS, *Cl'k Sup. Ct, D. C.*

Issued the 28th day of May, 1864.

Citation.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to Frederick E. Sickles and Trueman Cook, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office
3 of the supreme court of the District of Columbia, wherein the Washington, Alexandria, and Georgetown Steam Packet Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error should not be corrected and why speedy justice should not be done to the parties in behalf.

Witness the Honorable David K. Cartter, chief justice of the supreme court of the District of Columbia.

D. K. CARTTER, *Ch'f Justice.*

Service.

Service acknowledged.

BRADLEY & BRADLEY.

Mandate.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the District of Colum-
4 bia, greeting:

Whereas, lately, in the circuit court of the United States for the District of Columbia, before you or some of you, in a cause between Frederick E.

Sickles and Trueman Cook, plaintiffs, and the Washington, Alexandria, and Georgetown Steam Packet Company, defendants, the judgment of the said circuit court was in the following words, viz:

"Therefore it is considered by the court here that the aforesaid plaintiffs recover against the said defendants as well the sum of one thousand and fifty-three dollars and sixty-two cents, current money, their damages aforesaid, with interest as aforesaid, in form aforesaid assessed, to be sustained by occasion of the non-performance of the promise and assumption aforesaid as the sum of by the court here unto them, the said plaintiffs, on their assent adjudged, for their costs and charges by them about their suit in that behalf laid out and expended; and the said defendants, in mercy, and
5 so forth," as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and sixty, the said cause came on to be heard before the said supreme court on the said transcript of the record, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed with costs, and that the said defendants recover against the said plaintiffs, Frederick E. Sickles and Trueman Cook twenty dollars, dollars for their costs herein
6 expended, and have execution therefor. And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court for further proceedings to be had therein in conformity to the opinion of this court. (28 Jan.)

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity to the opinion and judgment of this court, as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Roger B. Taney, chief justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty.

Costs of defendants:

Clerk paid by plaintiffs.

Attorney	$20 00
	20 00

7 Taxed by Wm. Thos. Carroll, clerk of the Supreme Court of the United States.

Trial.

In the supreme court of the District of Columbia, Monday, November 9, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company.

Come as well the plaintiffs, by their attorneys, Messrs. Bradley & Bradley, as the defendants, by their attorney, Mr. Davidge, and thereupon comes a jury, to wit, Henry Polkinghorn, Benjamin H. Steinmetz, William H. Stanford, Henry Newman, R. J. Beall, Clark Mills, William Knowles, jr., Isaac C.

Bartlett, John B. Turton, Charles Myers, Alexander Lammon, and William Bond, who, being duly elected and sworn to try the issues joined be-
8 tween the parties, are respited, with the consent of the parties, till to-morrow morning at the meeting of the court.

The court adjourns till to-morrow morning, ten o'clock a. m.

TUESDAY, *November* 10, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company.

Come as well the plaintiffs, by their attorneys, Messrs. Bradley & Bradley, as the defendants, by their attorney, Mr. Davidge, and thereupon comes the jury aforesaid, to wit, Henry Polkinhorn, Benjamin H. Stinemetz, William H. Stanford, Henry Newman, Robert J. Beall, Clark Mills, William
9 Knowles, jr., Isaac C. Bartlett, John B. Turton, Charles Myers, Alexander Lammon, and William Bond, who, after hearing the case, are respited, with the consent of the parties, till to-morrow morning at the meeting of the court.

WEDNESDAY, *November* 11, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company.

Come as well the plaintiffs, by their attorneys, Messrs. Bradley & Bradley, as the defendant, by their attorney, Mr. Davidge, and thereupon comes the jury aforesaid, to wit, Henry Polkinghorn, Benjamin H. Stinemetz, William H. Stanford, Henry Newman, Robert J. Beall, Clark Mills, William
10 Knowles, jr., Isaac C. Bartlett, John B. Turton, Charles Myers, Alexander Lammon, and William Bond, who, after a further hearing of the case, are respited, with the consent of the parties, till to-morrow morning at the meeting of the court.

Defendants' 1st bill of exceptions.

THURSDSY, *November* 12, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly, plaintiffs,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company, defendants,

Now here come the parties, by their attorneys aforesaid, and the jury who were respited on yesterday, and the plaintiffs, to support the issue on their part, having read in evidence the docket entries of a suit brought by them against the defendants in the circuit court of the District of Columbia for Washington County, on the 16th day of March, 1846, together with
11 the pleadings, verdict, and judgment, in said case, [here insert all said docket entries, pleadings, verdict, judgment, being the case which was docketed under the mandate of the Supreme Court as No. 39 on the trial docket of said circuit court, at October term, 1855, copied in page 63,] made a part thereof. And the plaintiffs having given evidence tending to

prove that from the 16th of March, 1846, to the 16th of October, 1846, the said steamboat Columbia, belonging to the defendant, consumed a large quantity of wood, which, at the rate of saving mentioned in the first count of the declaration in this case, and the first count of the declaration as amended in the record of said case as read in evidence, saved a large quantity of wood on board of said boat, amounting in value to a large sum, to wit, over $2,000; and also, having given evidence to prove that during said
12 period of time the cut-off or machine described in said first counts remained on board of said boat, and was used by defendant. And thereupon, the plaintiffs having introduced further the following testimony, namely: 1st, of Gideon Larner, who, having been sworn and examined by Mr. Joseph H. Bradley, answered as follows:

Q. Were you on the jury in the fall term of 1855, that rendered a verdict in this case?

A. I was:

Q. Can you state whether, as a matter of fact, the contract beeween Sickles & Cook and the steamboat company was put in issue or not?

Mr. Brent. Put a general question; that is rather leading.

Mr. Bradley. Then I will put it in this form: State, if you please, what was the enquiry on that occasion.

A. My understanding of the case at that time was, and has been ever since, that the contract then set up in the case was one of the main issues in the trial.

13 2d. Of Elijah Edmondson, who, having been sworn, answered to Mr. Bradley's interrogatories as follows:

Q. Were you on the jury that rendered a verdict in this case during the October term, 1855?

A. I was.

Q. What was the issue before you then?

A. I think we based our verdict on the contract, which has been referred to as existing between Sickles & Cook and the steamboat company.

Q. They were the parties, but what was the subject of controversy?

A. It was, I believe, for damages in reference to the cut-off case, with regard to the saving of steam.

3rd. Of Reuben Worthington, who having been sworn, answered to Mr. Bradley's interrogatories as follows:

Q. You are one of the jurors who rendered a verdict in this case during the October term of '55, were you not?

A. Yes.

14 Q. Now will you state what was the subject of controversy then?

A. The issue was regarding the saving in fuel by the use of the Sickles cut-off as compared with the throttle cut-*cut*-off.

Q. Well, was it a question of damages or contract?

A. Of contract.

Q. Was the contract which the plaintiff set up the subject of controversy?

A. It was. We thought they proved the contract conclusively, and found our verdict accordingly.

4th. Gideon Larner, recalled, to Mr. Bradley's interrogatories, answers:

Q. Do you recollect at all the substance of the contract which was in issue?

A. It was, as well as I can recollect, that Messrs. Sickles & Cook were to receive three fourths of the savings.

Q. And how was the amount of the savings to be ascertained?

A. It was to be ascertained by burning one pile with the throttle cut-off and one pile with the Sickles cut-off.

Q. Was that also tried before the jury at that time—whether they had ever made the experiment?

A. Yes, to the best of my recollection, it was shown that the experiment was made on a trip from here to Baltimore.

Cross-examination by Mr. Brent.

Q. Was that the whole substance of the contract as you recollect it?

A. It has been a great while ago, and I have not bothered myself much about it, not being interested in the cut-off; but I remember that I suffered a great deal during the fourteen days I was on the trial.

Q. State what you recollect in addition.

A. My best recollection of the matter now is that there was a contract made between Messrs. Sickles & Cook and Dr. Gunton, on the part of
16 the steamboat company, by which it was agreed that the former were to put one of their cut-offs on the steamer Columbia, and if it did not answer it was to be taken off by Messrs. Sickles & Cook, at their own expense, and the boat to be left in as good condition as she was found in by them before this cut-off was put on. As I before stated, the manner of ascertaining the saving in fuel between the throttle cut-off and the Sickles cut-off was by burning one pile of wood with one instrument and another pile with the other instrument. That matter was subsequently ascertained, as was given in evidence to the jury at that time, by a trial trip round to Baltimore. The wood was arranged in two piles of equal size and quantity, and then the engine was run first from one pile and then from the other.

As I understood it at that time one of the main points in the case was
17 whether or not there was a contract existing between these parties. I so considered it, and went into the jury-room with that impression. Upon that contract was based, in the first place, a verdict for the plaintiffs. The question of savings was a subject for consideration afterwards.

Q. You say one of the main issues on that trial was the contract. What were the other issues?

A. Well, I suppose some of the other issues would only be some of the consequences arising from the contract.

Q. What I want to know is whether one of the issues discussed and argued in this case was not that the plaintiffs had a right to recover, even if there were no contract, for the use of it.

A. I do not recollect any such point.

Q. Do I understand you to say that even if there were no contract as alleged by the plaintiffs, yet, by the use of a patented machine, the plaintiffs had a right to recover, and the jury found a general verdict?

18 A. I do not recollect any such point being made in the case, because I would have thought had Dr. Gunton been using a patented machine there would have been other recourse for the parties.

5th. Of John Scrivener, who, being sworn, answered Mr. Bradley's interrogatories as follows:

Q. Were you one of the jurors who tried this case in October, 1855?

A. I was.

Q. Do you recollect the subject of controversy between the two parties?

A. It was, I believe, in regard to the validity of a contract set up by the plaintiff in that suit.

Q. Do you recollect whether there was anything in reference to an experiment required by the contract?

A. Yes; the contract seemed to be based on the experiment. If the cut-off on experiment failed there was to be no bargain. If it accom-
19 plished its object then certain portions of the savings were to go to Sickles.

Q. Do you remember what that experiment was to be?

A. It was to test whether more fuel was saved by the use of the Sickles than the throttle cut-off. Two piles of wood, of equal size and quantity, were to be placed on board and then the boat was to start on a trip from here to Baltimore, the engine being run first from the one pile and then from the other. The result of that experiment seemed to satisfy all of the superiority of the Sickles over the throttle cut-off, and Dr. Gunton and Mr. Smith, I think, consummated the contract on board of one of the steamboats at the wharf in the estimation of myself and fellow-jurors.

Q. Was not the question in controversy then whether or not the plaintiffs had proved the contract set up in the declaration as they claimed?

A. Yes; and in the estimation of the jury the contract was fully proved.

20 *Cross-examination by Mr. Brent.*

Q. Do you recollect any other terms of the contract that were proved other than those you have stated? Do you recollect whether one of the questions discussed by the jury was that independent of the question of a contract, if the use of this machine was beneficial to the defendants, that the plaintiffs had a right to recover for the use of it?

A. I think not.

6th. Reuben Worthington recalled. Examination by Mr. Bradley.

Q. Mr. Brent has asked Mr. Larner and Mr. Scrivener whether there was any other claim set up by the plaintiffs except that under the contract. Do you recollect of any such thing?

A. I do not. The subject was very elaborately argued by counsel on both sides. We based our judgment on the contract.

Q. You do not recollect that they claimed anything else except a contract?

21 A. The experiment was to be made, and it was made, as stated by by Mr. Larner. I am positive on that.

Q. I understand you to say, then, that the question before the jury was whether the plaintiff had proved their contract as set up in the declaration.

A. Most unquestionably, or we would not have given the verdict we did.

And thereupon the plaintiffs rested; and the defendant then called J. M. Carlisle, a competent witness, who tried said cause as counsel for the defendant before said jury, and offered to prove by him that the only contract as given in evidence on said trial was a parol contract, and the same was not reduced to writing; but the court, on the objection of plaintiffs' counsel, rejected said offered evidence, to which the defendant excepts.

And this bill of exceptions is signed, sealed, and enrolled this
22 twelfth day of November, 1863.

Defendants' 2d bill of exception.

After the evidence stated in the foregoing exceptions, made part hereof, the defendant further offered to prove by said Carlisle that the only contract offered in evidence on said trial at October term, 1855, was by parol and not reduced to writing, and that the said contract as so given in evidence was to be performed at the time stated in the first count in said declarations; to which offered evidence the plaintiff objected, and the court rejected so much thereof as related to said contract being in parol and not

reduced to writing, but admitted the residue of said offered evidence. And thereupon the defendant excepts to the said ruling of said court in rejecting said part of said offered evidence.

(Signed) D. K. CARTTER, *Chief Justice.* [SEAL.]

And then the jury is respited until to-morrow morning, at 10 a. m.

23 FRIDAY, *November* 13, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK USE OF George Mattingly, plaintiffs,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company, defendants.

And now again come here the parties aforesaid, by their attorneys aforesaid, and the jury who were respited on yesterday, who after a further hearing of the case are again respited till to-morrow morning, at ten o'clock a. m.

Defendants' 3d bill of exceptions.

SATURDAY, *November* 14, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly, plaintiffs,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company, defendants.

23½ And now again come here the parties aforesaid, by their attorneys aforesaid, and the jury respited on yesterday; and thereupon the defendant offers to read in evidence a certain paper writing, marked T. C., and endorsed Steamboat Columbia, testimony, &c., in the words and figures following, to wit: In relation to the cause of action of Frederick E. Sickles and Trueman Cook against the Washington, Alexandria, and Georgetown Steam Packet Company, for the use in their steamer Columbia of a patented machine known as Sickles cut-off.

The following is a true and just statement of the facts pertaining to the matter in dispute:

Some time in the month of June, 1844, myself, William Scott, then navy agent, and A. Thomas Smith, then chief clerk of the Navy Department, met on board the said steamer, at her wharf, in the city of Washington, D. C., William Gunton, president of the said company. In the presence of these gentlemen I then explained to said Gunton the merits of the said
24 cut-off and desired he should allow its introduction to the engine of the said steamer. I proposed to construct and attach it to the engine of said steamer at a cost not exceeding two hundred and fifty dollars, which amount should be paid from the first earnings, if any, by its use; that thereafter the said company should pay to Sickles and myself three fourths of the value of the fuel saved, and that a test should be made with Sickles and the throttle cut-off then in use on the engine of the said steamer; and that the said cut-off should be used during the continuance of the patent should the steamer last so long. I also stated that if the cut-off did not save fuel its use might cease and no compensation should be given by the said company for its introduction to the engine of the steamer. At this time said Sickles and myself were equal and joint owners of the patent for the said cut-off, and I had a power of attorney to act gen-
25 erally, and do all things for the said Sickles pertaining to the said invention he might or could do were he personally present. This re-

cital or proposition, preliminary to entering into a contract with said company by instrument in writing, did not result in the consummation of a contract. It was the understanding that an agreement or a paper should be drawn up and submitted to said Gunton as a proposition for his further and final consideration and adoption or rejection as he might think proper. And the said A. Thomas Smith was solicited by me, in the presence of said Gunton, to draw such instrument in writing in duplicate, which he consented to do. At this juncture Gunton and myself left the presence of said Scott and Smith and entered by ourselves alone the engine-room of said steamer, and there, whilst looking at the engine, said Gunton remarked that he
26 wished the paper referred to to be drawn so that he could elect after the cut-off was in use in said steamer either to purchase the right to use the said machine at the market value or to give the value of three fourths of the fuel saved. The said Smith did not write the proposed agreement referred to, although frequently asked by me so to do. With all due diligence, and at my instance, J. W. & R. C. Smith, of Alexandria, under my direction, proceeded to build and attach to said engine the said cut-off. Whilst attaching it said Gunton said to me that he wished me to bring a written proposition so that if it suited him we could enter into a contract by executing it, and that then there would be no misunderstanding. I promised it should be forthcoming, and then again asked said Smith to write it out. After the said cut-off was attached to said engine, and the day said steamer was to sail to Baltimore, I met said Gunton on board of her. We had a talk
27 together, in which he said he had no objection to my making a test for my own satisfaction, but that as there had been no contract between us he did not feel that he had anything to do with it. To which I said, if it should prove a great saving you will be willing no doubt to arrange for its use. His reply was that he had but little faith in patents anyhow. Some weeks after the test I called on said Gunton, at the Bank of Washington, and proposed to transfer by instrument in writing the right to use the said cut-off in said steamer during the continuance of the said patent for the sum of one thousand dollars. He declined giving this sum, stating, as his reason, that it was more than the fair market value, as I had passed the right for the steamer Augusta for the sum of two hundred and fifty dollars. Therefore we disagreed, and I availed myself of all the advan-
28 tages of legal procedure. Said Gunton and myself, when in the engine-room referred to, well understood each other, and he said then and there that he would not enter into any agreement such as I proposed in the presence of said Scott and Smith. I replied that what I said was merely a proposition, and we would make a contract if you are pleased with the written agreement said Smith is to write for your consideration. To which he said, "Bring the paper and I will look at it." The truth is there never was a contract for introducing the said cut-off in said steamer made between me and said Gunton, and if the proposition I made in the presence of said Scott and Smith was understood as binding on said Gunton, which in fact was not, the subsequent arrangement between said Gunton and myself was so clear and distinct and so well understood by us both as to preclude any possible construction going to imply that a contract had been made between said Gunton and myself in the presence of the said Scott and Smith.
29 And the defendant accompanied said offer with evidence to show that the same was wholly written, except the letters "T. C." and the endorsement aforesaid, in the proper handwriting of Trueman Cook, one of the legal plaintiffs, and the same was designed as a written statement of the facts relating to the matter in issue in this case, and that the same was written by said Cook since the last verdict and judgment aforesaid, at October term 1855, and since the first trial of this suit. And in offering said testi-

mony the defendants' counsel declare that the same is offered as newly discovered evidence not known or in existence at said former trials, and the same is now offered for the purpose of showing, by the admission of one of the legal plaintiffs, that there never was any contract between the plaintiffs and defendants as alleged in the counts of the declaration in this cause;
30 but the plaintiffs' counsel objects thereto, and assigns reasons for such objection as follows, that is to say:

1st. That this suit was assigned on the 12th March, 1855, to George Mattingly, pro ut, the docket entries and the order filed in this cause on the day last aforesaid.

2d. That the legal plaintiffs on the record did, on the 5th day of August, 1848, make the assignment, a certified copy whereof, marked A, [this paper not on file,] is herewith filed, made part hereof, and the said W. B. Sickles named in said assignment did, on the 2d March, 1855, make the written assignment herewith filed, headed "New York City and County, March, 1855."

But the defendants' counsel objects to the introduction of the supposed assignments and each of them above described, as the first and second reason for the objection. The defendants' counsel insists that the admissibility of the written declaration of said Cook, as offered by the defendant as aforesaid, cannot be at this stage of the cause affected by a consideration
31 of the assignments hereinbefore described or either of them, nor are the said assignments, or either of them, competent testimony in this cause. But the court overrules said last objection, and decides that said described assignments, and each of them, being proved, are competent testimony to the court, and the same would be considered in connection with the admissibility of said written declarations of said Cook as offered by the defendant as aforesaid. And thereupon the court allows said plaintiffs to prove the execution of the assignments aforesaid. To all and each of which rulings the defendant excepts; and this its bill of exceptions is signed, sealed, and enrolled this 14th day of November, 1863.

[SEAL.] D. K. CARTTER, *Chief Justice.*

32 *Defendants' 4th bill of exceptions.*

MONDAY, *November* 16, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly, plaintiffs,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company, defendants.

And now again come here the parties aforesaid, by their attorneys aforesaid, and thereupon comes the same jury who were respited on Saturday; whereupon the plaintiffs read in evidence certain articles of agreement between them, dated the eleventh day of February, 1842, and the letters patent granted by the United States to the plaintiff Frederick E. Sickles, dated the twentieth day of May, 1842, which are to be taken as part of this record, and are to be regarded as inserted in this place. And thereupon the defendant reads in evidence to the court a written contract between the plaintiffs and George Mattingly, dated in March, 1846, the execution whereof is
33 admitted, and the same is made part hereof, and is to be inserted at this place. And thereupon the court rejects said written admissions of said Cook as offered in evidence, and the defendant excepts; and this its bill of exceptions is signed, sealed, and enrolled this sixteenth day of November, 1863.

[SEAL.] D. K. CARTTER, *Ch'f Justice.*

Defendants' 5th bill of exceptions.

The defendant further offers to prove by Dr. Gunton, a competent witness, that he was president of the defendants' company, and that there never was any contract made between the plaintiffs and defendant, as averred in the declaration in this cause; but the court rejects said offered evidence by the witness named, and the defendant excepts; and this his bill of exceptions is signed, sealed, and enrolled this sixteenth day of November, 1863.

[SEAL.] D. K. CARTTER, *Ch'f Justice.*

34 *Defendants' 6th bill of exceptions.*

WEDNESDAY, *November* 18, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly, plaintiffs,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company, defendants.

And now again come the said parties, by their attorneys aforesaid, and also the same jury who were respited on yesterday; and thereupon the defendant offers evidence by a competent witness to show that during the period covered by the declaration in this suit the consumption of fuel in the furnaces of said steamer Columbia while the said cut-off was attached to said engine was as great in quantity as it was previously to said cut-off being attached, under like circumstances; but the court rejects said offered evidence. And thereupon the defendant excepts; and this his bill of exceptions is signed, sealed, and enrolled this 18th day of November, 1863.

[SEAL.] D. K. CARTTER, *Ch'f Justice.*

35 *Defendants' 7th bill of exceptions.*

Whereupon the defendant offers evidence to show that the experiment as made on the 20th August, 1845, to test the merits of the Sickles cut-off, as stated in the first count of the declaration in this case, was imperfectly and fraudulently made, and that such experiment did not in fact show the percentage of saving of fuel as laid in said special count or any saving of fuel whatever; but the court rejects said offered evidence, and the defendant excepts; and this his bill of exceptions is signed, sealed, and enrolled this 18th day of November, 1863.

[SEAL.] D. K. CARTTER, *Ch'f Justice.*

36 *Defendants' 8th bill of exceptions.*

THURSDAY, *November* 19, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly, plaintiffs,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company, defendants.

And now again come the said parties, by their attorneys aforesaid, and also the same jury who were respited on yesterday; and thereupon the defendant gives evidence by Benjamin F. Isherwood tending to prove that, by reason of physical laws, it would be impossible to ascertain the saving qualities of the Sickles cut off compared with the throttle cut-off, under the clause of the contract set out in the 1st and 2d counts of the declaration providing for experiment, said contract being silent both as to the

length of time for which the experiment should be continued and the quantity of fuel that should be consumed, both of which were indispensable elements to ascertain any result entitled to the slightest confidence; and that the experiment alleged in said counts as having been made in pursuance of said clause of the contract, if made in the manner and continued for the times alleged, was, in the nature of things and from physical laws,
37 wholly unreliable, the chance of a correct result being in the proportion of one to infinity. And thereupon the defendants' counsel propose to put the interrogatory following to said witness Isherwood, to wit: "Would you consider it physically possible by a single experiment, made in the manner and for the time stated in the first count of the declaration now read to you, to ascertain the amount of wood saved in the year succeeding that experiment by the continued use of said cut-off on board the steamer Columbia." But the court rejects the same, and refuses to allow said interrogatory to be put to the witness. And thereupon the defendant excepts; and this, its bill of exceptions, is signed, sealed and enrolled, this 19th day of November, 1863.

[SEAL.] (Signed) D. K. CARTTER.

Defendants' 9th bill of exceptions.

Thereupon the defendant gives evidence, by the said witness Isher-
38 wood, that in all experiments for testing the comparative saving qualities of different cut-offs a very considerable time was absolutely necessary, even when all the elements were carefully noted by instruments in perfect order, and the experiments conducted by persons of experience; and that in the experiments made for the defendant the shortest time during which they were continued was seventy-two hours, and they were extended beyond that time when it could be conveniently done; that such experiments were always begun and ended at precisely the same hour, so as to obtain a correct mean, and eliminate the errors incident to the beginning and end of the experiments, and that no competent engineer would attach the slightest weight to the result of the (an) experiment conducted in the manner and for the times alleged in the declaration in this cause, as such result might have been caused by difference in the quality of the wood used, in the steering of the vessel, wind, tide, the care of the firemen, and the
39 way they fired, and many other circumstances; that the quantity of water even in seasoned wood was from 16 to 33 per cent., which element alone admits of a margin of error of 16 per cent.; that fuel proper to be used in making such an experiment was coal, the calorific value of which was susceptible of exact ascertainment, and that any experiment with wood, with all the conditions most carefully noted with the most accurate instruments, involved at least 15 per cent. of error, owing to the character of the fuel, and that an experiment like that set out in the declaration and conducted as therein alleged must involve upwards of 25 per cent. of error, and would be wholly unworthy of confidence; that it was only within the last five or six years that numerous and protracted experiments had been made to test the saving of fuel resulting from the use of steam expansively by cutting off the supply from the boiler by means of a cut-off, and that
40 the result of such experiments was that only 18 per cent. of fuel could be saved, cutting off at the best point of the stroke of the piston, and that as between the several kinds of cut-offs there was hardly any appreciable difference, and that the throttle cut-off was shown by the results of such experiment to be as efficient for the purpose as the Sickles cut-off, and that, within the past five or six years, the error which before that period had existed as to the economic effect of using steam expansively had been, by actual experiment, removed, and that whilst as a theoretical proposition

the saving would be greater than 18 per cent. under the law of Mariott, yet there were physical laws and conditions whereby the theory was controlled, and under which the said saving of 18 per cent. was ascertained to be the greatest that could be effected by the use of steam expansively by means of a cut-off.

41 And thereupon the plaintiffs' counsel, by way of cross-examination, enquires of said witness whether by a series of experiments made in a period of years in the manner mentioned in the first count, the witness could not find by average the result, for commercial purposes, of saving of fuel effected by said cut-off. But the defendant objects to said enquiry, and the court allows the said enquiry to be made and answered by the witness. And thereupon the defendant excepts, and this bill of exceptions is signed, sealed, and enrolled this 19th of November, 1863.

[SEAL.] (Signed) D. K. CARTTER, *Ch'f Justice.*

And thereupon, after signing three bills of exceptions taken to its rulings, by the plaintiff, which are not inserted herein, because the plaintiff does not prosecute a writ of error, the court adjourns till to-morrow morning, at ten o'clock.

42 FRIDAY, *November* 20, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly, plaintiffs,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company, defendants.

And now, again come here the said parties, by their attorneys aforesaid, and also the same jury who were respited on yesterday; and thereupon the court adjourns until Monday, the 23d inst.

D. K. CARTTER, *Ch'f Justice.*

MONDAY, *November* 23, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly, plaintiffs,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company, defendants.

And now again come the parties aforesaid, by their attorneys aforesaid, and the same jury who were respited on Friday; and after a further
43 hearing of the evidence in the case, the jury are respited and discharged until to-morrow morning.

Defendants' 10th bill of exceptions.

TUESDAY, *November* 24, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company.

And now here again come the parties aforesaid, by their attorneys aforesaid, and the same jury who were respited on yesterday; and thereupon the defendant produces as a witness George W. Cochran, a juror at the trial of this cause at the October term, 1855, the record whereof has been given in evidence by the plaintiffs, and the said Cochran testifies as follows in answer

to interrogatories on behalf of defendant: That his recollection is
44 very vague and indefinite as to whether that jury found their verdict upon the evidence submitted to them upon the whole declaration or upon any particular count; that he cannot pretend to be positive upon any one point, except that said jury found a verdict for the plaintiffs, and assessed their damages; that he cannot say those damages were the amount per cent. shown, or supposed to be shown, by the evidence to have been saved, but his impression is that the jury tried to come as near as possible to that amount; that the jury thought the evidenced showed that the invention saved fuel, and they based their verdict on the amount saved, or supposed to be saved; that his impression is that the verdict was rendered on the entire merits of the case, without reference to any particular count; that the jury was satisfied there was a contract, but thinking that experiments might vary and that the damages in the case on trial and in those to come
45 would be very heavy, they assessed the damages at less, as they thought, than three fourths of the saving; that he thinks there was a contest on the trial as to whether the experiment shown in evidence was a fair test, or whether it was necessary to test it a little longer than it had been tested on that trial, and that there was evidence by scientific men, but by whom he does not recollect, that the experiment could not be a thorough test; that he has no recollection whether or not there was any contest as to the management of the experiment.

On cross-examination he says that the jury found that there was a contract between the parties, but cannot say that they considered the mode adopted of trying to ascertain the saving was part of the contract, or that it was stated in the declaration; that his recollection as to this matter is that there were two propositions made to the steamboat company, so much money or to buy it through the savings, which savings were to be ascertained
46 by a trial to be made, he presumes, on board the boat, though he cannot tell that.

And the defendant, having further proved by Benjamin T. Isherwood, as set out in the 8th and 9th bills of exceptions hereby made part hereof, again offers in evidence the paper writing marked "T. C." and endorsed "Steamboat Columbia, &c," and particularly set out in the 3d bill of exceptions, hereby made part hereof, and accompanies said offer with evidence to show that the said paper writing, except the letters "T. C." and the said endorsement, was in the proper handwriting of Trueman Cook, one of the legal plaintiffs, and that the same was written by said Cook since said trial, verdict, and judgment in October term, 1855; and further, that said testimony was newly discovered, and not in existence at said trial; and the defendant further renews the offer of the testimony set out in the fifth exception, hereby made part hereof. To which said offered evidence and every part thereof, the plaintiffs object; which objection the court sustains, and refuses to
47 allow any part of said offered evidence to be given to the jury. And to the said ruling of the court the defendant excepts, and prays the court to sign, seal, and cause to be enrolled this its 10th bill of exceptions, which is accordingly done this 24th day of November, 1863.

D. K. CARTTER, *Ch'f Justice.*

Defendants' 11th bill of exceptions.

And thereupon the plaintiffs offer to read in evidence the deposition of Job Corson, together with proof that the said Job Carson died a few days after the making of said deposition; which deposition is read as follows: "I was on board the steamer Columbia to go round to Baltimore; got on board nearly opposite Aquia Creek, near Thorn's Gut, August, 1845. Met on board Capt. Gayther, the mates, Engineer Rudolph, Patrick Kavanaugh, and Trueman

Cook. We measured off two piles of wood; they were as near the same size as we could make them; according to my judgment the piles were of
48 the same size. Mr. Cook told them to take their choice of the piles. The throttle burnt first. They had the privilege of taking which pile they chose. The throttle pile burnt two hours and seven minutes. After that was consumed they put on a Sickles cut-off, and burnt the other pile. That lasted 3 hours and 15 minutes. The steam was kept as near twenty pounds to the square inch as possible; that is what the gague indicated. During each experiment the engines making the same turns with both cut-offs—the engine making twenty-one revolutions per minute with each cut-off. We took notes every fifteen minutes; revolutions counted and notes taken to see that steam was kept the same height; notes kept by myself. Kavanaugh and Cook all kept minutes, but not always at the same time, but frequently all together. All notes separately at times. We went to office of boat,
49 and found all agreed. I am not in the least interested. I paid particular attention, was present during the whole trial. Gave 15 minutes to see steam up and revolutions. Engineer paid particular attention to his engine, and kept steam regular. Mr. Kavanaugh was clerk of the boat at the time, and he made minutes of the matter himself; did not commence experiments until they got through with all their landings. I was aboard several hours before the experiment began. Saw nothing else done before preparing the piles. They let the steam go down to a certain point. I suppose the reason they delayed was to have a straight line. The old throttle was put on; can't say it was 15 pounds or what; but they both started at the same, and run down to the same, and the time was noted accordingly. I do not know how the experiment could be conducted fairer than it was done. I suppose the cock of the injection pipe was in the room at the hand of the engineer; if the steam hand been tampered with the guage
50 would tell. If she had not enough steam, would run down; if too much, would run up. The memorandum was left that night in the office of the boat. The memorandum was made on a paper in a book; whether it made part of that book cannot say, but think it was. Each of us took notes. I had mine for some time; have not them now. I had a copy far a long time. We took the notes for our satisfaction. I kept my notes for my own satisfaction—I had no earthly interest in doing it—in a book; cannot say whether part of that book or not. Don't think she stopped at Piney Point. No recollection as to what landings; think most of it was done in the bay; three quarters I think in the bay; am not positive whether put on in the river or not; the largest portion of the time was in the bay. Boat leaves Washington at 6 o'clock a. m. I got on about noon. I think it was after dark when experiment commenced. I think the lamps were lit.
51 Rather a pleasant night, gentle breeze blowing from same quarter all night. I have not seen my notes for some time. I was looking, but could not find them. I am satisfied the timings are right. When the throttle was put on or what was done I cannot say. It was working well when I saw it, that is, on the experiment. I did not observe it on my way down until timing experiment. I went aboard understanding that the experiment was to be made, but not knowing it would be on that day. Probably a week before it happened it was understood with Capt. Cook that I would go on that day. Cap't Gayther invited me to go.

(Signed.) "JOB CORSON."

And the defendant objects thereto; but the court overrules said objection, and allows said deposition to be read in evidence to the jury. And thereupon the defendant excepts, and this its eleventh bill of exceptions is signed, sealed, and enrolled this 24th November, 1863

D. K. CARTTER, *Ch'f Justice.*

52 WEDNESDAY, *November* 25, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly, plaintiffs,
vs.
THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN Steam Packet Company, defendant.

And now here again come the said parties, by their attorneys aforesaid, and the same jury who were respited on yesterday; and after a further hearing of said case the said jury are again respited till Friday, November the 27th.

FRIDAY, *November* 27, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly, plaintiffs,
vs.
THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN Steam Packet Company, defendants.

Aud now here again come the said parties, by their said attorneys, and the same jury who were respited on Wednesday till this day; and
53 after a further hearing of said case the said jury is again respited until to-morrow.

SATURDAY, *November* 28, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, FOR George Mattingly's use, plaintiff,
vs.
THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN Steam Packet Company, defendant.

And now here again come the said parties, by their said attorneys, and the same jury who were respited yesterday; and after a further hearing of the case the said jury is respited till Monday next.

MONDAY, *November* 30, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly, plaintiffs,
vs.
THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN Steam Packet Company, defendants.

54 And now again come here the said parties, by their attorneys aforesaid, and the same jury who were respited on Saturday; and after a further hearing of the case said jury is again respited till to-morrow, at ten a. m.

TUESDAY, *December* 1, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly, plaintiffs,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company, defendants.

And now again come here the parties aforesaid, by their attorneys aforesaid, and the same jury who were respited yesterday; and after a further hearing of the case said jury is again respited until to-morrow, at ten o'clock a. m.

55 WEDNESDAY, *December* 1, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, FOR George Mattingly's use, pl'tiffs,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM George Company, def'd'ts.

And now again come here the parties aforesaid, by their attorneys aforesaid, and the same jury who were respited on yesterday; and after a further hearing of the case the said jury is again respited till to-morrow, at ten o'clock a. m.

THURSDAY, *December* 3, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly, pl'tff,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company, defendant.

And now again come here as well the plaintiffs, by their attorneys
56 aforesaid, as the defendant, by their attorneys, and the jury who were respited yesterday; and after a further hearing of the case the jury is again respited till to-morrow morning, at ten o'clock a. m.

FRIDAY, *December* 4, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, FOR George Mattingly's use, plaintiffs,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company, defendant.

And again come here the parties aforesaid, by their said attorneys, and the same jury who were respited yesterday; and after a further consideration of the case the jury is again respited until to-morrow morning.

57 SATURDAY, *December* 5, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, FOR George Matitngly's use, plaintiffs,
vs.
THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN Steam Packet Company, defendant.

And now here again come the parties aforesaid, by their attorneys aforesaid, and the same jury who were respited yesterday; and after a further hearing of the case the jury is again respited until Monday morning, at ten o'clock a. m.

MONDAY, *December* 7, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, FOR George Mattingly's use, plaintiffs,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company, defendants.

58 Come now again here as well the plaintiffs aforesaid as the defendants, by its attorney aforesaid, and the same jury who were respited on Saturday; and after a further hearing the said jury is again respited until to-morrow, at ten o'clock a. m.

Verdict.

TUESDAY, *December* 8, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, USE OF George Mattingly, plaintiffs,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company, defendants.

And now again come here the parties aforesaid, by their attorneys aforesaid, and the same jury who were respited on yesterday, to wit: Henry Polkinghorn, Benjamin H. Steinmetz, William H. Stanford, Henry Newman, R. J. Beall, Clark Mills, William Knowles, jr., Isaac C. Bartlett, John
59 B. Turton, Charles Myers, Alexander Lamon, and William Bond, who, upon their oath, say that 'they find the issues in favor of the plaintiffs, and assess their damages, by reason of the premises, at nine hundred and fifty-eight dollars and thirty-eight cents, with interest thereon from October 16, 1846, until paid.

Judgment.

SATURDAY, *December* 12, 1863.

FREDERICK E. SICKLES AND TRUEMAN COOK, FOR George Mattingly's use, plaintiffs,
vs.
WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM Packet Company, defendants.

And now here again come the parties aforesaid, by their attorneys aforesaid; and thereupon the plaintiffs move the court for judgment upon the verdict aforesaid, and the defendant moves that the verdict be set aside and
60 a new trial be granted it, which latter motion the court denies; and, proceeding to render judgment, it is considered by the court that the plaintiffs recover against the defendant the sum of nine hundred and fifty-eight dollars and thirty-eight cents, with interest thereon from October 16, 1846, till paid; the damages aforesaid in form aforesaid found, and the further sum of $ for his costs and charges by him about his suit expended, and that he have execution thereof. And to the ruling of the court refusing a new trial the defendant excepts, and prays that said exception be made of record, and the same is ordered accordingly and is done.

Appeal to general term.

And thereupon the said defendant prays an appeal to the court in general term, and the same is granted upon the execution of the bond required by the rule of the court; and thereupon the defendant offers the bond of the said steam packet company, signed by the president, under the seal
61 of the company, and by Wm. Gunton and James Adams, its sureties, in the penalty of five thousand dollars, conditioned as required by the rule aforesaid, and the same is accepted.

Proceedings in the general term on appeal.

Proceedings before the supreme court of the District of Columbia, holding the general term, commencing on the first Monday of May, 1864. Present and presiding, Chief Justice Cartter, and Justices Olin and Wylie. Absent, Justice Fisher, holding the criminal court.

Judgment affirmed.

TUESDAY, *May* 17, 1864.

It is ordered by the court that the appeal from the judgment of the circuit court, rendered December 12th, 1863, be heard on Saturday next, the 21st instant.

SATURDAY, *May* 21, 1864.

62 And now come here again the parties aforesaid, by their attorneys aforesaid; and thereupon, after argument of the motion of the appeal to this court, from the judgment of the justice holding the circuit court, rendered on the 12th of December, 1863, and mature deliberation thereon had, it is considered by the court that neither in the record of the proceedings of the said circuit court, nor in rendering the judgment aforesaid, from which this appeal is prosecuted, is there error; that, therefore, said judgment be, and the same is hereby, affirmed; that the plaintiff recover against the defendant the sum of nine hundred and fifty-eight dollars and thirty-eight cents, the damages aforesaid, adjudged against it in the circuit court, and the sum of $355 50 cents for their costs and charges awarded to them by the judgment of said court, and the further sum of $ for their costs and charges by them about their appeal expended, and that they have execution thereof.

63 Docket entries and other papers referred to in the defendants' 1st bill of exceptions, page 12.

October term, 1855.

FREDERICK E. SICKLES AND TRUEMAN COOK
vs.
THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN Steam Packet Co. } No. 39.—Trials.

Mandate from supreme court. Nar., non-ass't, and issue.

22d November, jury sworn. Verdict for plaintiffs. Damages, $1,695 79, with interest from 16th March, 1846. Verdict rendered 7th December.

14th December, judgment for plaintiffs on the first count in the declaration.

1855, December 14th, appeal bond, writ of error, citation, &c. Mandate from supreme court, certifying the docketing and dismissing said writ of error, with costs on 19th Dec., 1856. Copies and respondendum
64 issued in the above case in the usual form. Nar. in the above case, in the words and of the tenor following, to wit:

FREDERICK E. SICKLES AND TRUEM. COOK
vs.
THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN Steam Packet Co.

The Washington, Alexandria, and Georgetown Steam Packet Co. was summoned to answer unto Frederick E. Sickles and Trueman Cook in a plea of trespass on the case on promises; and thereupon the said plaintiffs, by Joseph H. Bradley, their attorney, complain for that whereas heretofore, to wit, on the eighteenth day of June, in the year eighteen hundred and forty-four, at the county aforesaid, the said plaintiffs, being the owners of the patent right for a certain machine called "Sickles cut-off," designed to effect a saving in the consumption of fuel by steam-engines. And the said
65 defendants being the owners of a certain steamboat called the Colum-

bia, running on the Potomac River and Chesapeake Bay, it was mutually agreed by and between said plaintiffs and said defendants that said plaintiffs would cause one of said machines to be constructed and attached to the engine of said steamboat of defendants, so soon as the same could conveniently be done, at a cost not to exceed two hundred and fifty dollars, the cost and expense of attaching the same to be paid for out of the first saving of fuel effected by its use, and that said cut-off should be constructed and applied to said engine by the firm of T. W. & R. C. Smith, of Alexandria, and if said cut-off, when applied to said engine, should fail to effect a saving of fuel, that it should be removed therefrom at the expense of said plaintiffs.

66 And it was also agreed, in consideration thereof, that if said cut-off, when constructed and applied to said engine, should effect a saving in the consumption of fuel thereby, that said defendants would use
68 said cut-off on their said engine in said steamboat Columbia during the continuance of the patent right of said plaintiffs, if said boat should last so long, and would apply the value of all the first savings of fuel on board said boat effected by the use of said cut-off in the first place to the payment of the cost and expense of constructing and attaching said cut-off to the engine of said boat, not exceeding two hundred and fifty dollars, until the same was fully paid and satisfied, and thereafter, and after having paid said cost and expense, that said defendants would, during the continuance of said patent right, if said steamboat should last so long, pay to said plaintiffs three fourths of the value of the fuel saved by the use of said cut-off. And it was also agreed then and there, by and between said plaintiffs and said defendants that the saving of the fuel caused by the use of said machine called Sickles cut-off on said steamboat should be ascertained at such
69 time as said plaintiffs should desire it, in the following manner, to wit, by taking two piles of wood, each of equal quantity, and using the same, first one pile without and then the other with the use of said cut-off, and thus to show whether the said boat would run the longest under the same circumstances with or without the use of said cut-off, and that the said proportion of earnings, so far as aforesaid ascertained, should be paid by said defendants to said plaintiffs weekly or monthly, or whensoever said defendants should be requested to pay the same. And thereupon the said plaintiffs, relying on said promises and undertakings of said defendants, and at their request, at great cost, to wit, at the cost of two hundred and twenty-five dollars, did cause and procure the firm of T. W. & R. C. Smith, of Alexandria, to construct and apply to said engine of said steamer Columbia said machine called Sickles cut-off, which said machine ever since, to wit,
70 from the 9th day of November, in the year eighteen hundred and forty-four, continually to the bringing of this action, hath been used by said defendants in and upon said boat, attached to the engine thereof. And said plaintiffs aver and say that heretofore, to wit, on the eighteenth day of August, in the year eighteen hundred and forty-five, at the county aforesaid, they gave notice to said defendants that on the next day, that is to say, on the twentieth day of August, in the same year, they desired to make the experiment in said agreement mentioned, to ascertain the amount of fuel saved by the use of said Sickles cut-off, and for that purpose that one of said plaintiffs would go from the city of Washington, in the District of Columbia, to the city of Baltimore, in the State of Maryland, in the said steamboat, on the said day, to wit, the twentieth day of August, before mentioned, for the purpose of making said experiment; and the said de-
71 fendants then and there, by their president, did assent thereto, and did direct the officers of said boat, or some of them, to aid in conducting said experiment. And said plaintiffs further say that one of said

plaintiffs, to wit, the said Trueman Cook, did on said twentieth day of August, A. D. 1845, proceed in said boat from said city of Washington to said city of Baltimore, and did, on the said voyage, with the assistance of the officers of said boat, make the said experiment by taking two piles of wood of equal dimensions and under like circumstances, using one pile of wood without and the other pile of wood with the said cut-off in operation. The pile of wood used without the said cut-off being in operation was burned in two hours and seven minutes, the engine making twenty-one revolutions per minute, and the pile used while the Sickles cut-off was in operation lasted three hours and fifteen minutes, the engine making the same number of revolutions, to wit, twenty-one per minute, showing a saving in favor of
72 said cut-off of thirty-four and one hundred and seventy-five one hundred and nineteenth per cent.; of all of which the said defendants afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice. And said plaintiffs aver that a great quantity of fuel has been saved to said defendants by the use of said Sickells cut-off on the engine of said steamboat Columbia, from said ninth day of November, in the year eighteen hundred and forty-four, to said nineteenth day of March, in the year eighteen hundred and forty-six, to wit, the amount of one thousand cords of wood, of great value, to wit, of the value of twenty-five hundred dollars. And said plaintiffs say that they are entitled to have and recover of said defendants, as a part of said savings, as well the said sum of two hundred and twenty-five dollars for the cost of constructing and applying said cut-off to the engine on said steamboat, as also the further sum,
73 to wit, the sum of nineteen hundred and seventy-five dollars, the value of three fourths of the fuel saved to said defendants (after deducting the cost of making and applying said cut-off as aforesaid) by the use of said cut-off on the engine of said steamboats of defendants during the period of time aforesaid, to wit, from said 9th day of November, A. D. 1844, to said 19th day of March, A. D. 1846. And whereas, also, afterwards, to wit, on the first day of March, in the year eighteen hundred and forty-six, at the county aforesaid, in consideration that the said plaintiffs, who were the owners of the patent right to a certain machine designed to effect a saving in the consumption of fuel by steam-engines, at the special instance and request of said defendants, who were the owners of a certain steamboat called the Columbia, had before that time constructed and applied one of said machines to the engine of said boat, and had agreed that said defendants should have the use of said cut-off on the engine of said boat during the continu-
74 ance of their patent right, if said boat should last so long, they, the said defendants, undertook and then and there faithfully promised the said plaintiffs to pay them so much money as they reasonably deserved to have of the said defendants, when they, the said defendants, should be thereunto afterwards requested. And the said plaintiffs aver that they reasonably deserved to have of said defendants the further sum of five thousand dollars, to wit, at the county aforesaid, whereof the said defendants afterwards, to wit, on the day and year last aforesaid, had notice. And whereas, also, the said defendants afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, were indebted unto said plaintiffs in the further sum of five thousand dollars, lawful money, for so much money by the said defendants before that time had and received to and for the use of said
75 plaintiffs; and being so indebted, afterwards, to wit, on the day and year aforesaid, undertook, and then and there faithfully promised said plaintiffs to pay them the said last-mentioned sum of money when they, the said defendants, should be thereunto afterwards requested.

And whereas, also, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, in consideration that said plaintiffs, who were the

owners of the patent right for a certain machine designed to effect a saving in the consumption of fuel by steam-engines, at the special instance and request of said defendants, who were the owners of a certain steamboat called the Columbia, had before that time constructed and attached one of said machines to the engine of said boat, and had agreed that said defendants should have the use of said cut-off on the engine of said boat during the
76 continuance of their patent right, if the said boat should last so long, the said defendants undertook and agreed to pay to said plaintiffs the cost of constructing and applying said cut-off to the engine of said boat, to wit, the sum of two hundred and twenty-five dollars, out of the value of the first savings effected by its use, and thereafter, and after having paid said sum of two hundred and twenty-five dollars, the cost of constructing and applying said cut-off to said engine, to account for and pay to said plaintiffs weekly or monthly, or whenever they should be so requested by said plaintiffs, the three fourths of the value of the fuel saved to said defendants by the use of the said cut-off on said boat, as long as the said patent right of said plaintiff should continue, if the said boat should last so long. And afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, a great quantity of fuel, to wit, one thousand cords of wood, of great
77 value, to wit, of the value of twenty-five hundred dollars, had been saved to said defendants; yet the said defendants, not regarding their said promises and undertakings, but contriving and intending to injure and defraud the plaintiffs in this behalf, have not rendered any account of the value of the savings effected by the use of the cut-off as aforesaid; and altho' often requested by said plaintiffs, to wit, on the day and year last aforesaid, and often afterwards, have hitherto refused and still refuse so to do; yet the said defendants have not paid the said several sums of money before mentioned, or any part thereof, altho' often requested so to do, to wit, on the day and year last aforesaid, at the county aforesaid, and often afterwards, but the same to pay, or any part thereof, have hitherto wholly refused, to the damage of said plaintiffs in the sum of five thousand dollars. And therefore they sue, &c., &c.

JOS. H. BRADLEY, *Pl'ffs' Atty.*

78 And the said docket entries referred to in defendants' 1st bill of exceptions, being extended, will appear as follows:

Plea of non-ass't.—Issue joined.

Whereupon the said defendants, by their attorney aforesaid, defend the wrong and injury, when, and so forth, and say that they did not assume upon themselves in manner and form as the aforesaid plaintiffs above against them have declared. And of this they put themselves upon the county. And the aforesaid plaintiffs, by their attorney aforesaid, in like manner, and so forth. Therefore let, &c.

Verdict.

Whereupon a jury being duly empannelled and sworn to say the truth of and upon the premises aforesaid, upon their oath do say that the said defendants did assume upon themselves in manner and form as the aforesaid plaintiffs above against them have declared, and they assess the damages of the said plaintiffs, sustained by occasion of the non-performance of
79 the promise and assumption aforesaid, to the sum of sixteen hundred and ninety-five dollars and seventy-nine cents, current money, with interest from 16th March, 1846.

Motion for judgment.—Judgment

Whereupon the said plaintiffs, by their attorney aforesaid, pray judgment against the said defendants upon the first count in the declaration in and upon the verdict aforesaid, by the jurors aforesaid given in the form aforesaid; therefore it is considered by the court here that the said plaintiffs recover against the said defendants on the said first count in the declaration aforesaid, as well the sum of sixteen hundred and ninety-five dollars and seventy-nine cents, current money, with interest from sixteenth of March, eighteen hundred and forty-six, the damages aforesaid by the jury aforesaid in form aforesaid assessed, to be sustained by the occasion of the
80 non-performance of the promise and assumption aforesaid as the sum of by the court hereunto them, the said plaintiffs, on their assent adjudged, for their costs and charges by them about their suit in this behalf laid out and expended. And the said defendants in mercy, &c.

Recital of writ of error.

And whereas afterwards, to wit, on the 28th May, 1864, the said defendant, by its attorney aforesaid, produced and filed in court here the U. S. writ for the correcting of errors of and upon the judgment aforesaid directed to the justices of the supreme court of the District of Columbia, and at the same time exhibited to the court here an appeal bond, which by the court was approved of, in the words and of the tenor following, to wit:

Bond for prosecution of writ of error.

Know all men by these presents that we, the Washington, Alexandria, and Georgetown Steam Packet Company, William Gunton and James Adams, of Washington County, in the District of Columbia, are held and
81 firmly bound unto Frederick E. Sickles and Trueman Cook in the sum of two thousand dollars, current money, to which payment, well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this twenty-eighth day of May, 1864.

Whereas, lately, at a supreme court of the District of Columbia, in a suit pending in the said court wherein the said Frederick E. Sickles and Trueman Cook were plaintiffs and the Washington, Alexandria, and Georgetown Steam Packet Company was defendant, judgment was rendered against the said defendant, and having obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court of the District of Columbia, to reverse the judgment in the aforesaid suit, and a citation directed to the said Frederick E. Sickles and Trueman Cook, citing and admonishing
82 them to be and appear at the Supreme Court of the United States, to be holden at Washington, on the first Monday of December next:

Now the condition of the above obligation is such that if the said Washington, Alexandria, and Georgetown Steam Packet Company shall prosecute its writ with effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be null and void; otherwise, to be and remain in full force and virtue in law.

(Signed) W. GUNTON, [SEAL.]
President Steam Packet Co.
W. GUNTON. [SEAL.]
JAS. ADAMS. [SEAL.]

Witness:
(Signed) W. Y. FENDALL.
" C. A. JARNET.

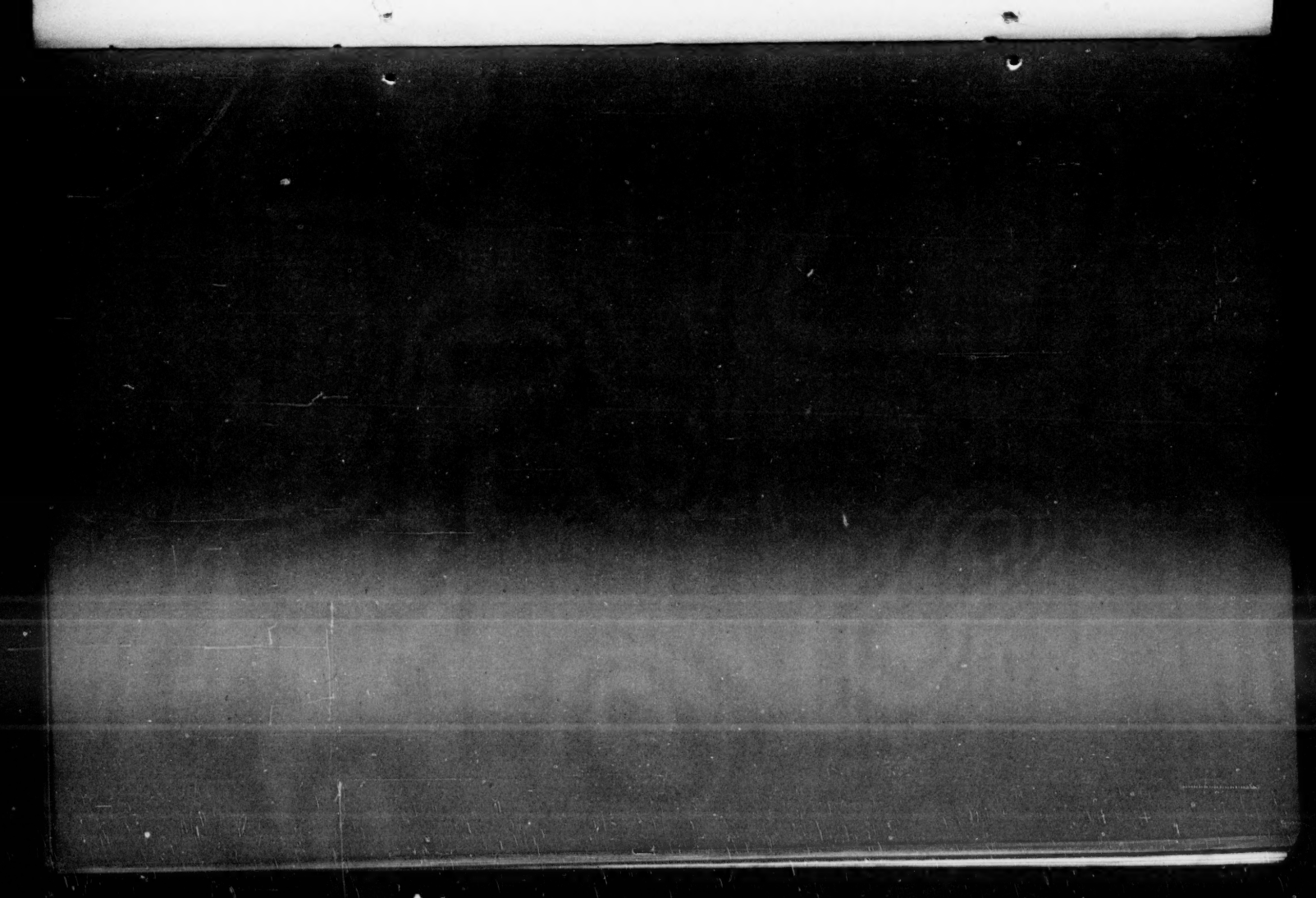
Certificate.

Therefore in pursuance thereof a transcript of the record of proceedings of the judgment aforesaid and all things thereunto relating with the
83 writ of error aforesaid, and a copy of the appeal bond is transmitted to the said Supreme Court accordingly.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court this 3rd day of September, 1864.

[SEAL.] R. J. MEIGS, *Clerk*.

Filed December 8, 1864.



Supreme Court of the United States.

DECEMBER TERM, 1866. No. 123.

THE WASHINGTON, GEORGETOWN, AND ALEXANDRIA STEAMPACKET COMPANY, Plaintiff in Error

vs.

FREDERICK E. SICKLES and TRUMAN COOK.

Brief for Plaintiffs in Error.

Case.

This was an action of Assumpsit brought by the Defendants in Error to recover for the use of Sickles' Patent Cut-Off, so called, upon the steamboat Columbia, owned by the Plaintiff in Error. The declaration as first filed contained five counts, but a *nol pros.* was entered as to all but the first.

That count set up that on the 18th of June, 1844, an agreement was made between the parties whereby Sickles and Cook were to attach the Cut-Off to the boat at an expense not to exceed $250—such expense to be paid out of the first savings of fuel to be effected by its use; that if it should fail in making such saving, it should be removed at their expense; if it should succeed, the Company were to continue its use during the continuance of the Patent, if their boat should last so long, and to pay, first, the expense of attaching, and, thereafter, three-fourths of the total value of the fuel saved by its use, payable weekly or monthly; that the amount of that saving should be ascertained, by an experiment or trial on some one trip; that the Defendant in Error did erect the Cut-Off, at a cost of $225, and the Plaintiff in Error had continued to use it from the 9th day of November, 1844 to the commencement of this suit; and the Patent was still in force; that on the 20th of August, 1845, the experimental trial was had, and the saving found to be $34\frac{75}{100}$ per cent.; that during the period now sued for 1,000 cords of wood had been saved, worth $2,500, of which three-fourths were payable to the Plaintiffs.

The declaration then set up that on the 19th of March, 1846, the Plaintiffs had sued the Defendants to recover for their share of the saving down to that date, and had filed a declaration setting up in the first Court the very same contract, and a jury had been sworn to try the issue; that one issue joined was as to the existence of that contract, and the jury rendered a verdict on that count, upon which verdict a judgment was entered, which verdict and judgment established the contract, and the Defendant was thereby estopped to deny its existence.

The Defendant below pleaded the general issue, *non assumpsit*, upon which plea issue was joined to the country.

In January, 1858, a trial was had and a verdict and judgment rendered for $1,053.62. The case was brought by Writ of Error to this Court, and the judgment reversed at the December Term, 1860. (The decision of the Court is reported at 24 Howard's Rep., page 333.)

In November, 1863, a second trial was had—the jury being sworn to try the issues on the first count only. On the 12th of December the jury rendered a verdict for $958 38, with interest. Motion was made for a new trial but denied, and judgment entered. An appeal to the General Term (Court in banc) was taken, but the judgment was affirmed May 21, 1864, from which the case is now brought by Writ of Error.

It is proper to mention that three different suits, for different periods of time, have been commenced upon this same contract, all of which have been brought to this Court.

Suit No. I was commenced March 19, 1846, to recover for the use of the Cut-Off down to that date. In March, 1847, a verdict and judgment were rendered for $1,800. On a Writ of Error to this Court the judgment was reversed at December Term, 1850. (10 How., 441.)

A second trial was had upon an amended declaration, (of which, see copy in the present Record,) to which the general issue was pleaded, (fo. 78,) which resulted, December 7, 1855, in a verdict and judgment for $1,695.79. (Ib. 78.) A Writ of Error was sued out to this Court, but not prosecuted, and the case was docketted and dismissed December 19, 1856.

Suit No. II is the one now before this Court, commenced October 16, 1846, to recover for the period between March 19, 1846, and that date. This case was allowed to lie until 1857, and till after suit No. I was finally disposed of.

Suit No. III was commenced December 26, 1855; tried in November, 1858; judgment for $16,388.25; brought by Writ of Error to this Court, and reversed at December Term, 1860, being heard at the same time with No. II. (24 How., 333.) No further steps have been taken in the case.

First Point.

It is insisted that the Plaintiffs below waived the alleged estoppel by their manner of pleading; that they took issue upon the point or question of fact, and thus set the matter at large.

Estoppels are not favored in the law, and he who would rely upon one must, at his peril, set it up in his pleading, if he have opportunity, and adhere to it strictly.

Feversham v. Emerson,
11 *Exch. R.*, (*Hurlst & G.*) 385.

The law as to estoppel is well settled. The rule is, that an estoppel is as a plea, a bar, as evidence conclusive.

2 *Smith's Lead., Cas.* 435.

In order, however, that it shall be conclusive as evidence, without having been pleaded, it is necessary that there should have been no opportunity for pleading it. When such is the case, it may be introduced and considered and be conclusive.

But, if there had been an opportunity to plead it, and the party has allowed that opportunity to pass, he cannot claim the estoppel as conclusive in evidence. It becomes but simple evidence, subject to rebuttal—persuasive, but not conclusive.

On the other hand, if he has once pleaded it, but afterwards joins in an issue upon the truth of the fact, he loses all benefit of the estoppel.

In the present case, the Plaintiffs below did set up the prior judgment, and claim it as an estoppel in the declaration. To this the Defendant below pleaded the general issue. That plea was a denial of the truth of the promise or undertaking alleged in the declaration, the attachment of the cut-off, the experimental trial, and the amount of saving ascertained.

In the issue thus tendered, the Plaintiff below joined, thereby making several issues upon as many points of fact.

An averment of an estoppel is in its nature a refusal to litigate the fact; a denial of the right of the Defendant to call in question the fact.

Maule, J., in Matthews v. Osborne.
13 *Com. Bench, R.*, 4 *J. Scott*, 919, 943.

Such a plea is like a plea in Chancery—an excuse for not answering to the merits.

In the present case the matter of estoppel appeared upon the record, having been expressly set forth in the declaration. The plea denied the very thing which the Plaintiff claimed the Defendant could not deny. The plea was therefore insufficient, and the Plaintiff should have demurred if he intended to rely upon the estoppel, and not have joined issue.

In cases where the matter of estoppel does not appear in the declaration, if the Defendant set up a plea of a new matter, as *nil habuit in tenementis* or the like, concluding with a verification, the Plaintiff must apply to the estoppel or he waives it.

1 *Chitty's Plead.*, 603.

This rule has been extended to cases of pleas concluding to the country, and it is held that the Plaintiff, by joining in the issue of the fact tendered, sets the matter at large.

Feversham v. Emerson, above cited.
Matthew v. Osborne, above cicted.
See, also, *Sanderson v. Collman*, 4 *Man. & Gr.*, 290.
Bowman & Rostran, 4 *Nev. & Mann.* 557.
2 *Adol & Ell.*, 295, (*note.*)
Magrath v. Hardy, 6 *Scott*, 627.
1 *Chitty Pl.*, (11*th Am. Edit.*,) 580, 603, 611, *and cases cited.*

2 Smith's L. C. 443 444 445

Upon the same principle, if the matter of estoppel be set out in the declaration, and the Defendants interpose a plea denying the truth of

the facts, and the Plaintiff join issue upon such plea, he sets the matter at large. He must in such case demur, or possibly reassert the estoppel in a replication. The same rule applies to a Defendant joining in an issue.

First, that the Plaintiff may demur.

In *B ck tt* vs. *Bra lley*, 7 Man and Gr., 994, the Plaintiff's declaration set out deed executed by the Defendant, in which it was recited that the Plaintiff was possessed of or entitled to certain railway shares. The Defendant pleaded that he was not so possessed or entitled. To this plea the Plaintiff demurred, on the ground that Defendant was estopped to deny the fact recited, and the demurrer was sustained. Tindal, J., said: "May not a party avail himself of an estoppel by demurring where the matter of estoppel appears on the record? Could not the Plaintiff have replied the indenture, and relied on the estoppel in it? and, if so, why may she not demur, the estoppel appearing on the record?"

In *Bowman* vs. *Taylor*, 2 Adol and Ellis, 278, the Plaintiff demurred to pleas denying facts recited in his deed set out upon the record, and the demurrer was sustained.

S. P. Hill v. *Manchester Water Works*, 2 *B. & Adol.*, 544.

Second, that the Plaintiff must demur at his peril, else he sets the matter at large, where the matter appears on the record.

Wilson v. *Butler*, 4 *Bing. N. C.*, 748, (1836.)

In this case the Plaintiff set up in his declaration a deed of the Plaintiff and Defendant, in which it was agreed that a certain committee should pass upon and certify a certain fact, to wit, the amount of indebtedness of a certain company, and their certificate should be conclusive. He then averred that the committee had certified the indebtedness to be so much, *as the fact was.* The Defendants pleaded that they did not so certify, nor was it the fact. The Plaintiff joined issue on this plea. On the trial it was insisted by the Plaintiff that the Defendant was estopped, but held "that the Plaintiff has not relied upon the estoppel, but has himself showed the truth or falsehood of the facts stated in the certificate by averring them to be true, and thereby making the truth of such facts the very issue which the jury are called on to try; and that on an issue so framed the jury are bound to find according to the real truth of the facts passed before them."

Howard v. *Mitchell*, 14 *Mass.*, 241.
Chew v. *Moffett*, 6 *Munf.*, 120.

That the same rule applies to a defendant.

In *Magrath* v. *Hardy*, 4 Bing. N. C., 752; 6 Scott, 627, (1828,) the Plaintiff sued for money had and received. The Defendant pleaded a recovery and execution against him for the same debt in favor of a Plaintiff in a foreign attachment, a creditor of the now Plaintiff, and set up the county record. The Plaintiff replied that no execution had ever been levied, (which by law was made necessary to bar his claim.) Upon this replication the Defendant joined issue. At the trial the Defendant insisted that the Plaintiff was estopped from denying the truth of the record, (which asserted an execution levied,) but held by

the Court that he was not estopped, and that "if the estoppel appears upon the record, and the party who is entitled to take advantage of it, instead of relying upon it, goes to issue on the fact, he puts the matter at large, and the jury may disregard the estoppel. * * The Defendant, by taking issue on the replication, has waived any benefit he might have derived from the estoppel, and has left the matter at large. * * * The defendant has by his own acts expressly, and in terms, waived the benefit of the estoppel, and referred the truth of the fact to the consideration of the jury."

The Courts cite and rely upon the case of *Trevivian* v. *Lawrence*, 1 Salk., 276.

In *Young* v. *Raincock*, 7 C. B., Man., Gr. & Scott, 310. (1849,) the Plaintiff sued for the breach of a covenant for quiet enjoyment. The Defendant, in his plea, set out, upon oyer, the deed containing the covenant, in which it was recited that Mrs. Raincock was the lawful heir of one Ann Copley, and then asserted that she was such heir. The Plaintiff replied *de injuria*. At the trial the Defendant claimed an estoppel on this fact of heirship, but the claim was decided upon the ground that the Defendant had "not adopted the course of referring the consideration of the estoppel to the Court, but has pleaded the fact of Mrs. Raincock's heirship, and by joining issue on the replication has referred it as matter of fact to the jury, who are not bound by the estoppel, but may find the truth of the fact according to the evidence."

The Court cite *Magrath* v. *Hardy* (above cited) and other cases.

In the case of *The Philadelphia, Wilmington and Baltimore Railroad Company* v. *Howard*, 13 How., 307, 336, it was held that when an opportunity is offered of pleading the estoppel it must be pleaded; otherwise the matter is at large.

See 5th 6th & 7th Exceptions

SECOND POINT.

Admitting argument *gratiâ* that the estoppel was not waived by the Plaintiffs joining issue upon the promise or undertaking, instead of relying upon the estoppel averred in the declaration, the Court manifestly erred in excluding the testimony of Mr. Carlisle set out in the 1st and 2d Bills of Exception, as well as the testimony set out in the 5th, 6th, and 7th Bills of Exception—

1. Because the fact that the only evidence offered at the trial alleged to be an estoppel was mere parol evidence, was a fact proper for the consideration of the jury in weighing the evidence offered by the Plaintiffs to show what the prior jury found. The recollection of certain jurors, especially when contradicted by that of Cochran, one of them, (R. 12, 13,) surely did not conclude the last jury, who were to find what was contraverted and found at the previous trial.

2. Because the estoppel relied on was not an estoppel of record, in the strict legal sense, but was to be applied by the jury to the subject matter by parol evidence. (See this Case, 24 How.)

As the case was tried, the Court assumed the absolute truth of the evidence offered by the Plaintiffs, and set out in the 1st Bill of Ex-

ceptions, and refused to submit that evidence to the jury, or to allow the Defendants to offer any evidence based on the hypothesis that the estoppel might not be found as claimed. 5th, 6th & 7th Exceptions

In other words, the Court undertook to determine the weight of the parol evidence; but

3. And principally because Mr. Carlisle's evidence, if admitted, showed conclusively that the evidence submitted at the former trial had relation only to the common counts. Evidence of a parol contract could not support the first count of the declaration in the former suit; nor could such evidence be objected to, as it was admissable as tending to show the measure of damages under the common counts.

We claim that if, in fact, the prior jury found only a parol contract, we are not estopped from denying its validity in law in the present case. We are estopped only from denying the particular points of facts found, to wit, a parol promise.

The fact (if true) that we did not, at the former trial, make objection on this ground was, at most, but an admission for the purposes of that case. It was an admission of law, which does not estop in any subsequent action. Questions of law are not submitted to, or found by, a jury, but only the naked issue of facts.

See Hughes vs. Alexander, 4 *Duer*, 488.
Carter vs. James, cited below.
Richardson vs. City of Boston, 19 *How.*

We claim that the contract being in parol merely was void in law; it was not to be performed within one year.

Taking it for granted, for the present, that it was void, we cite the following cases to show how far the Courts go in searching out the particular points of facts—the *punctum facti*—decided by the prior jury, and in holding such point to be aside and different from the one at issue in the case on trial.

Carter vs. James, 13 Mees. & Wels., 137. In this case the defendant had given a bond, secured by mortgage for £600. The mortgage contained a covenant to pay the debts. The plaintiff sued upon the bond, but the defendant set up an usurious agreement, and averred that the bond was given "in pursuance of that agreement," and so was void. The plaintiff replied that it was not given in pursuance of that agreement, and upon this issue was joined and a verdict found for the defendant. Afterwards the Plaintiff sued upon the covenants contained in the mortgage, it being confessedly for the same debt. The Defendant pleaded the former verdict by way of estoppel, but, on demurrer, the plea was held bad, on the ground that the points of facts found in the former case was no answer in this; that point being that the bond was given in pursuance of the Complainant's agreements, whereas in the present case the point was whether the covenant was so given, and whether the agreement itself was usurious.

Here the covenant was an agreement to pay the very same debts as were named in the bond; and if the bond was given in pursuance of the Complainant's agreement, the inference is irresistible that the covenant was so also; yet the Court made a distinction.

In the prior case the Plaintiff had not denied the fact of an usurious agreement, but had by his pleading virtually admitted it for the purposes of that case. Held (Alderson, B.) that his so admitting did not estop him on that point, as it was one on which the jury did not pass.

So in the present case we deny that there was a written contract; we are not estopped from doing so by our not having denied it at the former trial, nor by the jury finding that there was a parol contract.

Burlew v. *Shannon*, 14 Gray, (Mass.) 145.

A prior judgment had been recovered against the Defendant for the board, for a certain period of his wife, who had left his house, she being justified in doing so, it was claimed, on the ground, first, of his cruelty, and, second, of his consent. On a suit to recover board for a subsequent period, the claim then being that the wife was absent from cruelty, (not his consent) the former verdict was claimed as an estoppel. But the claim was denied on the ground, that it was dubious whether the jury found cruelty, and it must be left to the present jury to decide, from the evidence produced to them, what particular fact (of the two alleged) the former jury found.

Sawyer v. *Woodbury*, 7 Gray, 499.

In this case, a Plaintiff had brought an action of covenant, alleging several distinct breaches. The jury found a general verdict in his favor. In a subsequent suit, he set up one of those breaches, and claimed the former verdict as an estoppel. But the Court, (Shaw J.) held, that evidence might be adduced to enable the jury to decide which breach it was the prior jury found.

Was the alleged contract, if merely parol void? The English Statute of 29 Car., II, Ch. 3, is in force here.

The patent of the Plaintiffs was dated May 30, 1842, and was to continue 14 years—(Act Congress, July 4, 1836, § 5,) that is, until May 20, 1856.

The alleged contract was to operate from 1844, to the end of that period, (12 years) "if said boat should last so long." During that period, the Defendant was to continue to perform its part of the contract, to-wit, pay the proportion of savings.

It was manifestly the intention and understanding of the parties that the performance on either side was not to be completed within a year.

The possible contingency of the boat's ceasing to exist was foreseen; but the expectation evidently was that she would endure to the end of the patent.

The statute avoids all contracts not "to be" performed within one year—meaning acts agreed, stipulated, not to be so performed; acts agreed, stipulated to be done beyond the end of one year. Now, the acts stipulated to be done by the Defendant in this case were, as alleged, to pay the money at certain intervals throughout the period of twelve years. In order to perform the contracts, the Defendant must make these payments.

In case the boat ceased to exist during that period, the Defendants would be excused from paying afterwards; but this would be a defeasance, as if by a condition subsequent, not a performance of the contract.

In the present case, if the words, "if the boat shall last so long," were not inserted, there can be no question the alleged agreement would be void. We submit that these words cause no difference.

The agreement was, not to pay so long as the boat should last. If that had been the agreement, then it might by possibility have been fully performed in one year. But the agreement was, to pay for twelve years, though it was provided that such payments for that period might be excused and dispensed with, if the boat should previously cease to exist.

The fact that further performance may be thus dispensed with will not take the case out of the statute.

Hill vs. Hooper 1 Gray 131
Browne on St of Frauds S. 282 -
Bayldell v. Drummond 11 East 142

Birch v. Earl of Liverpool, 9 *B. & C.*, 390.
Robey v. Tucker, 3 *Excheq. R.*, 632.
Pentreguinea Coal Co., 8 *Jur.*, 706.
Dobson v. Collis, 1 *Hurlst & Nor.* 81.
37 *Eng. Law & Eq.*, 499.
Tierney v. Marshall, 7 *Irish Com. Law Rep.*, 308.
Harris v. Porter, 2 *Harring*, (*Del.*,) 27.

In this case the Court says the contract may have been put an end to, but could not have been *performed* within the year, and so was void.

In Dobson v. Collis supra Alderson, B. says: "The very circumstance that the contract exceeds the year brings it within the statute. If it were not so, contracts for any number of years might be made by parol, provided they contained a defeasance which might come into operation before the end of the first year." And Pollock, C. B. says: "I think that a contract is not the less a contract not to be performed within the year, because it may be put an end to within that period. A lease for five years, subject to a defeasance on the happening of a certain event, does not cease to be a lease for five years, because it may be defeated at the end of the first year."

That the parol evidence offered at the former trial, although inadmissible under the speceial counts of the declaration, was admissable under the common counts. See Browne on Statute of Frauds, ss. 124, 125, and cases cited. also King v. Browne 2 Hill

As the evidence was admissible in support of the common counts, the Defendant could not object at the trial.

THIRD POINT.

The admissions of Cook were competent evidence. It was for the jury to determine as to the alleged assignments. See 3d Bill of Exceptions.

~~FOURTH POINT.~~

~~There was error in the ruling shown by the 4th Bill of Exceptions. The alleged contract is on its face champertous and void.~~

Dobson v Collis 1 Hurlstone Norme

J. M. CARLISLE,
W. D. DAVIDGE.

BRIEF OF DEFENDANT IN ERROR

IN THE

WASHINGTON, ALEXANDRIA & GEORGETOWN STEAM-PACKET CO.

vs.

SICKLES & COOK.

DECEMBER TERM, 1866.

In the Supreme Court of the United States.

DECEMBER TERM, 1866. No. 123.

WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM PACKET CO.

Against

SICKLES & COOK.

In Error to the Supreme Court of the District of Columbia.

This cause was before this Court at December term, 1860, and is reported in 24 Howard, 333.

Under the mandate then issued another trial was had, in which the Plaintiff gave in evidence the same docket entries, pleadings, verdict, and judgment as were given on the former trial; and, pursuant to the ruling of this Court, in 24 How., further examined a number of the jurors who were on the former trial. By the testimony of these witnesses, at pp. 4, 5, and 6 of the record, corroborated by the testimony of another of the same panel, called by the Defendants, p. 13 of the record, it clearly appears that the contract specially declared on in the first two counts of the declaration in that cause; the experiment provided for in that contract; the result of that experiment, and the consequent saving of fuel to the Defendants, were the main, if not the only issues, in that cause; and were found by that jury. They further gave evidence, pp. 13 and 14, of the fact of the experiment, and the rate of saving exhibited by it, and the quantity and value of the fuel consumed on board the steamboat during the time covered by this action, and also the patent for the cut-off, to show that it was running during all that time, and rested.

The Defendants then offered to show that the only contract given in evidence was a parol contract, not in writing. The Court rejected the proof as offered, and the Defendants excepted. This is their first exception.

SECOND.

They then offered further to prove that the said contract so given in evidence was not in writing, and was to be performed at the time stated in the first count in the declaration. The Court admitted this last evidence as to the time of performance.

THIRD.

They then offered a statement in writing, with proof, to show that it was wholly in the hand-writing of Cook, one of the original Plaintiffs, written since the last trial of the cause, positively stating that no such contract was made between the said Plaintiffs and Defendants as is set up in this action, pp. 8 and 9.

The Court found that this cause had been assigned to the Plaintiff, George Mattingly, by the original Plaintiffs on the record of the Court, on the 12th March, 1855, (p. 9,) by an order that day filed in the cause, and that prior to that time the legal Plaintiffs had, on the 5th August, 1848, by a paper writing filed in the cause at the trial, made a certain other assignment (to one William B. Sickles) under which he, on the 2d March, 1853, made the said assignment to Mattingly, recorded on the 12th March, 1855; and the Court allowed the Plaintiffs to prove these several assignments, and the Defendants excepted.

FOURTH.

The Plaintiffs here gave in evidence the original patent, together with a written agreement between them and the said George Mattingly, dated March, 1846, (but which has not been copied into the record,) and upon these proofs the Court rejected the said written admissions of Cook, and Defendants except.

FIFTH.

The Defendants then offered to prove that no such contract had been made as was set up in this case. The evidence was rejected, and Defendants except.

SIXTH.

They then offered to show that the consumption of fuel on board said steamboat was as great in quantity while the cut-off was used, as before, under like circumstances; which was rejected.

SEVENTH.

They then offered evidence that the experiment to test the two machines was imperfectly and fraudulently made, and did not in fact show the per centage of saving claimed; which evidence was rejected.

EIGHTH.

They offered to give evidence by Benj. I. Isherwood, to show that there was none, or very little saving by the Sickles cut-off over the Throttle, and the mode agreed upon by the Plaintiff and Defendant was wholly uncertain and defective; to all which the Plaintiffs objected; (but their objection was overruled, and they took three several bills of exception to said rulings, which are not in said record,) and thereupon the Court permitted them to give the evidence. In the course of which, p. 11, the witness was asked by the Defendant's counsel, "Would you consider it *physically* possible by a single experiment made in the manner, and for the time stated, in the first count of the declara-

tion now read to you, to ascertain the amount of wood saved in the year succeeding that experiment by the continued use of the cut-off on board the steamer Columbia?" Objected to, and objection sustained.

NINTH.

The Defendant then proceeded to give the evidence set out at pp. 11 and 12, by Isherwood, to show the effect and value of machines to cut off steam, and that 18 per cent was the utmost extent of the saving; and thereupon the Plaintiffs asked the witness, on cross-examination, whether, by a series of experiments made in a period of years in the manner mentioned in the first count, the witness could not find by average the result, for commercial purposes, of saving of fuel by said cut-off. And the Defendants objected; the Court admitted the question.

TENTH.

The Defendants again offered Cook's written statement on the ground of newly-discovered evidence; it was again rejected.

ELEVENTH.

The Plaintiff gave evidence as to the actual experiment and the result thereof; Defendant objected, and the Court admitted it.

POINTS.

It will thus be seen that there are only two questions involved in these eleven exceptions.

FIRST. Was the verdict and judgment on the former trial conclusive on all the questions directly in issue on that trial, upon the proof offered by the Plaintiffs, if believed by the jury; and could the Defendants go behind that verdict and judgment while the Plaintiffs confined themselves to proof of what was then in issue and tried by the jury?

For the defence it will be insisted that this question was definitively setttled, in 24 How., 333, and that the Court below was right in rejecting all evidence tending to show that no such contract had been made, or that the said contract was not in writing, or that the experiment was insufficient to establish the rate of saving, or had been unfairly or fraudulently conducted.

All these matters were directly involved in the issues raised by the two counts in the declaration and the pleas in the former action, and passed upon by the jury, as shown by the witnesses.

SECOND. The other question is novel; but, according to general principles, and the settled law of Maryland, by which it is to be determined, is free from difficulty.

It involves two questions:

First. Whether they could by such proof go behind the verdict and judgment in the former case? and—

Second. Whether the Court had jurisdiction to decide upon the questions passed upon by it, as to the right of Cook, by any statement of

his made after he had parted with his interest, to impair the interest so assigned by him; and whether he had or could have had, after the assignments, any right, in any way, to control the case?

I. As to the first question, that is embraced in and covered by the question of the conclusiveness of the verdict, and judgment; and if the Defendant has any relief it must be in Equity.

II. The power of the Court to determine upon the force and effect of the several written assignments, whether Cook had any interest in the case, can hardly be doubted. The question was purely a question for the Court, as preliminary to the further question, whether Cook's declarations, made after he had parted with all his interest, could be given in evidence.

III. That they could not follow from the decisions of this Court in Welch v. Mandeville, 1 Wheat., 233; same case, 5 Wheat., 277; the judgment of Judge Washington, Corser v. Craig, 1 Wash., C. C. R. 424; Gill v. Clagett, 4 Mary'd. Ch., 153; the Act Maryland, 1796, Ch., 43, § 13, and the settled practice in Maryland as to assignments of cases, made of record. #

The principle to be deduced from these cases is, that the assignor cannot by any act of his defeat the right of his assignee.

Finally, there was no error in any of the rulings of the Court in any one of the exceptions in the record.

JOS. H. BRADLEY,
For Defendant in Error.

See cases collected in
Paige v Cagwin 7 Hill 361

The Plaintiff in Error, in his brief, relies on the Pleadings and Statute of Frauds.

As to the first point: The declaration was the same which was before this Court in 24 Howard, except the common counts, which were stricken out.

The pleadings on the first count are good. All that part of the first count which relates to the former trial, verdict, and judgment, is immaterial, and may be rejected as surplusage. It does not set up an estoppel of record, and is no more than a statement of the proofs by which the contract was to be established.

2. But the second count is not subject to any such objection.

As to the Statute of Frauds:

1. If the contract was within the statute, the fact whether it was in writing or not was directly in issue. If the Defendant waived it, as he might, he should have offered evidence of that fact. He did not make such offer.

2. *It is not pretended in any of the bills of exceptions that it was not set up in that action.*

If it had been the authorities from Peter *v.* Compton, Skinner, 353, to this day are numerous to show that the case was not within the statute.

It was a contract to put a machine on Defendant's boat, to be paid for by a share of the savings of fuel caused by its use, to be ascertained as soon as the machine was in working order: that share to be paid for, from time to time, whenever demanded. The contract might run on to the expiration of the patent, or it might be terminated the next day. There is nothing from which it can be inferred that the parties understood it could not be performed within the year. It would have been *completed* by the loss or destruction of the boat at any time during the year.

There is a clear distinction between a performance which shall *complete*, and one which may *defeat* the contract within the year. If it can be *completed* within the year, it is not brought within the statute, by the fact that it *may* run on for many years.

The authorities in support of this proposition are very fully collected in Browne, on the Statute of Frauds, 2d edition, ch. 13, § 272, and § 276, 7, 8, and 9.

JOS. H. BRADLEY,

For Deft. in Error.